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Table of Contents



## Uncharged Misconduct: Dangerous Waters


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In the recently reported case of *U.S. v. Harris*,[1] the accused, a senior noncommissioned officer, was convicted of disobedience of an order of his superior commissioned officer in violation of Article 90, Uniform Code of Military Justice. During the prosecution's case in chief, First Sergeant S. testified that he had gone to the accused's Bachelor Enlisted Quarters room at the request of Captain G. to see why the accused had not complied with the captain's order. The first sergeant testified in substance that at about 8:00 A.M., he was admitted to the accused's room by a woman and that the accused was in bed. Later on in the trial, the accused was cross-examined by the trial counsel who brought out that the accused was married but that his wife was not with him at Fort Polk on the day in question. At that point in the trial, the following colloquy took place:

"Q. Was your wife staying with you at that time?

A. No sir, my wife was in south Louisiana.

Q. So, when First Sergeant S. says he came to your BEQ room and saw a women—woman in your room, then he must have the room confused?

A. Well, sir, I don't know. . ."[2]

At this point, the accused attempted to offer an explanation. The U.S. Army Court of Military Review held that this testimony was "evidence of possible misconduct, or at least a violation of a moral code which could be viewed as much by the triers of fact and it was error for the military judge not to at least offer for counsel's consideration a *sua sponte* limiting instruction concerning its use."[3] The Court went on to offer the following general observations:

> "We feel that counsel's foray into this area was unnecessary under the circumstances of this case. This is especially so, in view of the clear and compelling evidence of guilt. We urge all counsel and trial judges to be particularly circumspect in the use of misconduct evidence, as those waters are dangerous. An otherwise well tried case often founders on the rocks and shoals of uncharged misconduct."[4]

Based upon the sound advice of this appellate court, a reexamination of the law pertaining to the use of evidence of uncharged misconduct may be useful for both military counsel and military judges alike. While the law in this area is based primarily on the rules of evidence contained in the Manual for Courts-Martial,[5] the military appellate courts have made a number of significant pronouncements in this area within the recent past.

## Admissibility of Evidence of Uncharged Misconduct

The general rule is that evidence of offenses or acts of misconduct of the accused, other than those charged, is not admissible as tending to prove the guilt of the accused on the offense or offenses charged.[6] The rationale behind this rule is that this type of evidence is not relevant[7] and it violates the rule of evidence prohibiting the introduction of evidence that the accused has a bad moral character for the purpose of raising an inference of guilt.[8] However, evidence of other offenses or acts of misconduct of the accused may be admitted if the evidence has a "substantial value as tending to prove something other than a fact to be inferred from the disposition of the accused" (*i.e.*, the inference of his guilt based on his bad moral character) or if the evidence is offered "in proper rebuttal of matters raised by the defense."[9] The Manual for Courts-Martial recognizes seven areas, or exceptions to the general rule, in which evidence of other offenses or acts of mis-

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conduct of the accused is admissible.[10] They are as follows:

1. When it tends to identify the accused as the perpetrator of the offense charged.
2. When it tends to prove a plan or design of the accused.
3. When it tends to prove knowledge or guilty intent in a case in which these matters are in issue.
4. When it tends to show the accused's consciousness of guilt of the offense charged.
5. When it tends to prove motive.
6. When it tends to rebut a contention, express or implicit, made by the accused that his participation in the offense charged was the result of accident or mistake or was the result of entrapment.
7. When it tends to rebut any issue raised by the defense, unless its sole purpose is to rebut evidence of the accused's good character.

The Federal Rules of Evidence set forth a similar listing of exceptions in this area, including two more which are not specified in the Manual for Courts-Martial.[11] These are the following:

1. When it tends to prove that the accused had the opportunity to commit the offense charged.
2. When it tends to prove that the accused engaged in preparation for the commission of the offense charged.

Arguably, these two exceptions can be included in the exceptions set forth in the Manual for Courts-Martial pertaining to proof of identity of the accused and proof of plan or design of the accused.[12] However, the federal rule sets forth these two exceptions in addition to the federal exceptions pertaining to proof of identity and plan of the accused.[13] With regard to their application to military practice, the Manual for Courts-Martial provides that so far as not otherwise prescribed in the Manual, "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . will be applied to courts-martial."[14] Since the Manual purports only to list examples of areas in which the general rule against the introduction of evidence of uncharged misconduct should not be observed and does not purport to limit to possible exceptions to those specified,[15] it appears that these two exceptions set forth in the Federal Rules of Evidence are not incompatible with military practice and, therefore, are entitled to full application as rules of evidence in courts-martial.

The Court of Military Appeals has stated that evidence of uncharged misconduct is not automatically admissible simply because it fits under one of the uncharged misconduct exceptions. The Court held in *U.S. v. Janis*,[16] that "three additional prerequisites must be satisfied before such evidence qualifies for admission." These are as follows:

1. There must exist a nexus in time, place, and circumstance between the offense charged and the uncharged misconduct sought to be introduced.
2. The evidence of uncharged misconduct must be "plain, clear, and conclusive."
3. The evidence of uncharged misconduct may not be admitted if its potential prejudicial impact far outweighs its probative value.

The third prerequisite means that, when the evidence of uncharged misconduct is offered, the military judge, in ruling on its admissibility, must balance the probative value of the evidence against its possible tendency to unfairly prejudice the accused by the introduction of highly inflammatory evidence, as well as by its tendency to confuse the issues or mislead the jury.[17]

In summary, evidence of uncharged misconduct will be admissible if it (a) properly fits under one of the uncharged misconduct exceptions and (b) survives judicial scrutiny in light of the three prerequisites in the *Janis* case. In addition, the listing of uncharged misconduct exceptions set forth above does not purport to be a complete listing of all of the exceptions

which are possible. In view of the wording of the military and federal rules of evidence in this area, it appears that other legal rationale supporting the admissibility of evidence of uncharged misconduct are possible, as long as the requirements for admissibility set forth here are satisfied.

### U.S. v. Grunden

One of the most significant and controversial military cases in this area is the case of *U.S. v. Grunden,*[18] which was decided in the U.S. Court of Military Appeals in 1977. In the *Grunden* case, the accused was convicted of attempted espionage and failing to report contact with persons believed by him to be agents of governments hostile to the United States. During the trial, the prosecution presented numerous acts of misconduct by the accused, which were admitted over defense objection, including possible earlier acts of espionage. The military judge accurately noted each of the acts of uncharged misconduct and stated his intention to instruct the court members as to the limited purpose for which this evidence had been admitted. The trial defense counsel, however, made a specific request that the limiting instruction on uncharged misconduct not be given. The military judge acceded to the request and did not give the limiting instruction.

The Court of Military Appeals held the actions of the military judge in accepting the waiver of the limiting instruction by the defense to be impermissible, saying that "(w)hen evidence of uncharged misconduct is permitted, nothing short of an instruction will suffice."[19] The Court presented the rationale for its holding by citing with approval[20] a portion of its opinion from the case of *U.S. v. Graves,* as follows:

> "Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial."[21]

In the *Graves* case, the Court held that the military judge's failure to instruct the court members on the issue of the voluntariness of a pretrial statement by the accused was not waived by the defense counsel's failure to request the voluntariness instruction or to object to the instructions given. In so deciding, the Court expressly overruled one of their earlier decisions, the *Meade* case,[22] in which the defense counsel expressly waived the voluntariness instruction pertaining to a pretrial statement by the accused and the Court of Military Appeals held that the military judge acted properly in acceding to the waiver. It had long been the military rule that the military judge was required to instruct the court members on the limited purpose for which evidence of uncharged misconduct was received, even in the absence of a defense request for such an instruction.[23] The *Meade* case, decided in 1971, provided legal authority at that time for defense counsel to seek a waiver of the limiting instruction regarding uncharged misconduct. When the *Meade* case was expressly overruled by the *Graves* case, the right of the defense to waive the limiting instruction regarding uncharged misconduct was in serious doubt and that issue was finally put to rest by the *Grunden* case.

### Grunden: Pro and Con

Since the *Grunden* case was decided, it has been the source of both comment[24] and controversy. The most frequently heard argument criticizing the decision in this case is that by taking away the discretion of the military judge to accept a waiver by the defense of the limiting instruction regarding evidence of uncharged misconduct (assuming the military judge had such discretion prior to *Grunden*), the Court of Military Appeals has thereby unduly fettered the defense counsel in his representation of the accused by preventing him from waiving an instruction which he views as harmful to his client since it tends to remind the court members of evidence which is damaging to the defense case.

This argument is deficient in several respects. First of all, it assumes that the court members either were not listening when the evidence of uncharged misconduct was presented during the trial or that they have forgotten about it between that time and the time in the trial when they are instructed on its use. Hopefully, these assumptions are unfounded. The court members are instructed by the military judge at the beginning of the trial to pay "(c)lose and continuing attention to all that transpires."[25] In addition, it seems logical to assume that most service members who meet the requirements of Article 25, U.C.M.J., for court membership will have reasonably retentive memories.

Secondly, the argument against the *Grunden* case assumes that the trial counsel will not argue the evidence of uncharged misconduct to the court members, thereby reminding them of its existence. If the evidence of uncharged misconduct is properly admitted, then the trial counsel is at liberty to argue this evidence to the court members vigorously and in detail, so long as his argument is within the bounds of fair comment on the evidence[26] and does not suggest to the court members that they may consider the evidence of uncharged misconduct for a purpose other than that for which it was admitted.[27]

Finally, and perhaps more importantly, the argument against the *Grunden* case assumes that the court members will not consider the evidence of uncharged misconduct for an improper purpose. As the Court said in *Grunden,* "No evidence can so fester in the minds of the court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged misconduct. Its use must be given the weight of judicial comment, *i.e.* an instruction as to its limited use."[28] Without the benefit of a limiting instruction, the court members may conclude that since the accused may be guilty of uncharged misconduct, he is therefore a person of bad moral character who probably is guilty of the offense charged, despite what the evidence presented on the offense charged may have shown. Cynics may argue that court members engage in this type of thought process during deliberation anyway. The danger, however, is that, in the absence of a limiting instruction on the use of evidence of uncharged misconduct, court members may engage in this type of thought process and believe that by doing so they are acting properly.

In sum, it appears that the *Grunden* case has not imposed undue restrictions on the defense counsel in his representation of his client by eliminating one of the options which the defense counsel may exercise on behalf of the accused. What the Court of Military Appeals seems to have said in *Grunden* is that this "option" (i.e., the waiver of the limiting instruction) is one which simply does not exist because the Court has determined that a waiver of this instruction would, as a matter of law, result in more harm than good to the accused. Indeed, if the only argument which can be advanced in support of waiver is the one discussed previously, then it appears that the possible benefits to be obtained by waiver, if any, are more than outweighed by the potential dangers of having the court members consider evidence of uncharged misconduct without any guidance from the bench.

Another argument critical of the *Grunden* case has been that it was the harbinger of future judicial intrusions into the exercise of discretion by the defense counsel in his representation of the accused. This has proven not to be the case. In *U.S. v. Rivas,*[29] for example, a case decided approximately six months after *Grunden,* the Court of Military Appeals was confronted with a situation in which a prosecution witness refused to answer proper questions on cross-examination by the defense and the defense failed to exercise its remedy of moving to have the witness' direct testimony stricken from the record. The Court searched the record of trial for any possible advantage which the defense counsel could reasonably have drawn from that direct testimony being left before the court members. Finding none, the Court reversed the case on the grounds of ineffective assistance of counsel. In so doing, the Court left the door open to the possibility of a waiver by the defense in this area by saying the following:

"Indeed, in some rare instances, it may even be to the perceived advantage of the defense to retain the direct testimony in the record even in light of the denial of effective cross-examination in a certain area. While the wishes of counsel are not determinative where evidence is per se inadmissible or where the military judge has an independent and paramount obligation to guide the proceedings toward the end of justice,. . ., we believe tactical decisions of the sort involved here properly are made by the party subject to be aggrieved."[30]

It seems, therefore, that the fears of those who believed that the Court of Miltiary Appeals was bent on restricting the actions of the defense counsel wherever possible have been unfounded. The *Rivas* case stands in sharp contrast to *Grunden* because in *Rivas* the Court of Military Appeals could envision factual situations where the exercise of waiver by the defense would be in the best interest of the accused while, in *Grunden,* the Court could envision no such factual situations. This is not to say that such a situation can never arise. The Court of Military Appeals, however, has simply made the judgement, implicit in the *Grunden* decision, that such a situation would be so rare, in which waiver would be in the best interest of the accused, that the general rule prohibiting waiver would be nonetheless required to protect the accused in the vast majority of cases.

### Cases Since *Grunden*

Since the *Grunden* case was decided, the Court of Military Appeals has handed down additional decisions further explaining the law as it is developing in this area. In addition, the intermediate military appellate courts have decided several cases in this area in which the law set forth by the Court of Military Appeals has been interpeted and applied in situations not previously addressed by the Court of Military Appeals.

In *U.S. v. Bryant,*[31] evidence presented by the prosecution in rebuttal to the defense of entrapment which included inculpatory statements made by the accused during the negotiations for the drug sale as well as statements made to the agent in the hallway prior to the trial was held by the Court of Military Appeals to have been properly admitted by the military judge. However, the military judge failed to give the court members an instruction on the limited purpose for which the evidence of uncharged misconduct had been received. Unlike *Grunden,* the military judge neither offered such an instruction to the defense nor did the defense specifically waive such an instruction. The Court held that the failure of the military judge to instruct the court members on this issue *sua sponte* was prejudicial error.

In a footnote, the Court repeats a rule that they have applied previously when dealing with the sufficiency of instructions saying that "a trial judge need not track the language of each standard found in the (Military Judges Guide) so long as he provides clear guidance on the particular question, and tailors the evidence presented to the issue(s) to be resolved. His discretion does not, however, involve omission of guidance."[32]

In *U.S. v. James,*[33] the Court of Military Appeals held that a limiting instruction on uncharged misconduct was not required in connection with the admission of statements of wrongdoing by the accused when the statements were made by the accused in close proximity with the commission of the offense alleged. The Court distinguished *Grunden,* saying: "In *Grunden,* the uncharged misconduct which we found required a *sua sponte* instruction was evidence which gave rise to acts sufficient to support independent criminal charges of equal gravity as those charges for which Airman Grunden was on trial . . . (T)he rule should not necessarily apply where the uncharged misconduct is part of the chain of events that leads to the consummation of the crime charged. Some acts have meaning only when they are placed in the fabric of the completed crime."[33]

In *U.S. v. Woolery,*[34] the Court of Military Appeals held that when the only issue at a trial on a charge of rape is whether the sexual act was with the consent of the alleged victim, evidence of an uncharged rape was not admissible,

the reason being that "the fact that one woman was raped . . . has no tendency to prove that another woman did not consent."[35] The Court went on to point out that such evidence of uncharged misconduct may well be relevant and admissible when offered for some other purpose, such as to identify the assailant or to prove his motive or intent.

Exactly one week after the *Woolery* case was decided, the Court of Military Appeals handed down perhaps their most perplexing opinion in this area. In *U.S.* v. *Deford*,[36] the accused testified in his own defense and stated that not only were the allegations against him false, but also his general character was that of a moral, law-abiding citizen. On cross-examination, the trial counsel elicited testimony from the accused concerning a prior conviction by civil authorities in North Carolina. The military judge failed to give the court with members an instruction on the limited purpose for which this evidence had been received. The Court of Military Appeals found no error and affirmed the conviction. In a separate opinion by Judge Cook, he concurred in affirming the conviction but he also questioned the consistency of the majority of the Court in finding no error. He pointed out that in *Bryant* and *Grunden,* the Court had held that the military judge has an affirmative duty to give a cautionary instruction on the limited purpose of evidence relating to uncharged misconduct even if the defense offers to waive such an instruction. Judge Cook then states: "Thus, *Bryant* and *Grunden* appear to require a finding of error in the present case; consequently, I do not understand the principal opinion."[37] Judge Cook viewed the omission of the instruction by the military judge as error, although harmless. Explaining the difference in results between *Deford* and the other cases previously discussed is not easy. Perhaps the Court is drawing a distinction between impeachment and uncharged misconduct for this particular purpose. If so, it appears to be a distinction without a difference.

In *U.S. v. Montgomery*,[38] the Army Court of Military Review held that evidence of uncharged sexual activities committed prior to the commission of the robbery of which the accused was convicted was properly admitted as general purpose evidence forming part of the *res gestae* and no limiting instruction was required.

In *U.S. v. Clark*,[39] the Army Court of Military Review held that the military judge was not required to give a limiting instruction on uncharged misconduct where the misconduct occurred immediately prior to, contemporaneous with, or immediately subsequent to the offenses charged and was so interwoven with the charged offense that it was inseparable for all practical purposes or where the evidence in question did not, in fact, raise an inference of misconduct. The Court found that two of the items of evidence it was called upon to address did not constitute misconduct: evidence that the accused had been complaining about his duties and the testimony of the accused that he was pending a Chapter 13 discharge.

In *U.S. v. Infante*,[40] the Army Court of Military Review adopted a broad definition of the term "misconduct". The Court held that the admission by the accused in his testimony that he had lied to the CID agents who interrogated him about a matter which was central to their investigation was of sufficient seriousness to be labeled "misconduct", thus requiring a limiting instruction, even though these lies were not chargeable offenses under the UCMJ. The holding in this case parallels the "violation of a moral code" rule which was expressed by the Army Court of Military Review in *U.S. v. Harris*.[41]

### Responsibilities

It is clear that in the area of uncharged misconduct, the trial counsel, defense counsel, and military judge each have their own responsibilities to which they must be very attentive. The trial counsel must ensure during his pretrial preparation that the evidence of uncharged misconduct he plans to offer will be admissible. He must be certain that his evidence fits under one of the uncharged misconduct exceptions and that it will hold up under the three-pronged *Janis* test.

The responsibilities of the defense counsel in this area are numerous. Under the *Grunden*

case, since the limiting instruction on evidence of uncharged misconduct will always be required, the defense counsel should channel his efforts in this area toward the preparation of a proposed instruction to be submitted to the military judge for presentation to the court members. The defense counsel can accomplish at least two things in this regard. First, he can ensure that the instruction contains an accurate summary of the evidence of uncharged misconduct, so that the accused is not erroneously credited with misconduct more aggravated than that which was presented. Secondly, the defense counsel can make suggestions to the military judge on the wording of the limiting instruction and, in doing so, try to obtain an instruction from the military judge which is phrased in such a way that when it is given to the court members, it will contain as little "sting" as possible. The defense counsel may also determine that he would prefer, for whatever reasons, that the limiting instruction not be given, and despite *Grunden*, he may still have some success. Under *Grunden*, waiver of the instruction is no longer a realistic possibility but the defense counsel may nevertheless obtain the desired result if he can persuade the military judge that the instruction is not required. When the evidence of uncharged misconduct constitutes an integral part of the charged offense, the limiting instruction is not required.[42] Likewise, if the defense counsel can persuade the military judge that the evidence in question is not "misconduct" *per se*, even though it may cast the accused in a bad light, he may avoid the limiting instruction in this manner.[43]

The military judge bears the heaviest burden of all in terms of his responsibilities in this area. The military judge must keep detailed notes throughout the trial enumerating the instances of uncharged misconduct presented. The military judge must determine the admissibility of each act of uncharged misconduct, whether offered by the prosecution or the defense,[43] using the rules set forth previously. For that evidence which he rules admissible, he then has the duty to instruct the court members on the limited purpose for which the evidence was admitted. For that evidence which is offered in the presence of the court members which is subsequently ruled inadmissible, he has the duty to instruct the court members to disregard that evidence.[45] In extreme cases, he may consider granting a motion for a mistrial.[46] In making these decisions, the military judge is entitled to and should frequently seek the advice and assistance of counsel. He must bear in mind, however, that the final responsibility for the accomplishment of his own judicial duties as well as for the oversight of the actions of counsel lies with him for, as the Court of Military Appeals has said, "the trial judge is more than a mere referee, and as such he is required to assure that the accused receives a fair trial."[47]

## Footnotes

[1] 6 M.J. 758 (ACMR 1978).

[2] Id at 760. footnote 1.

[3] Id at 760.

[4] Id at 760, footnote 1.

[5] MCM, 1969, para. 138g.

[6] Id.

[7] MCM, 1969, para. 137.

[8] MCM, 1969, para. 138f(2).

[9] MCM, 1969, para. 138g.

[10] Id.

[11] Fed. R. Ev. 404b.

[12] MCM, 1969, para. 138g.

[13] Fed. R. Ev. 404b.

[14] MCM, 1969, para. 137. See also, *U.S.* v. *Johnson*, 3 M.J. 143 (CMA 1977).

[15] MCM, 1969, para. 138g. *"For instance,* evidence of other offenses or acts of misconduct of the accused is admissible in the following circumstances" (emphasis supplied).

[16] 1 M.J. 395 (CMA 1976).

[17] *U.S.* v. *Schaible*, 11 U.S.C.M.A. 107, 28 C.M.R. 331 (1960). See also, Fed. R. Ev. 403.

[18] 2 M.J. 116 (CMA 1977).

[19] Id at 119.

[20] Id at 119.

[21]U.S.C.M.A. 434, 437, 50 C.M.R. 393, 396, 1 M.J. 50, 53 (1975).

[22]*U.S.* v. *Meade*, 20 U.S.C.M.A. 510, 43 C.M.R. 350 (1971).

[23]*U.S.* v. *Back*, 13 U.S.C.M.A. 568, 33 C.M.R. 350(1963). *U.S.* v. *Tucker*, 17 U.S.C.M.A. 551, 38 C.M.R. 349(1968). See also, U.S. Dept. of Army, Pamphlet No. 27-9, Military Judges Guide, para. 9-31(1969).

[24]76 Mil. L. Rev. 43, 56(1977).

[25]U.S. Dept. of Army, Pamphlet No. 27-9; Military Judges Guide, para. 2-1(1969).

[26]MCM, 1969, para. 72b.

[27]ID. See also, *U.S.* v. *Nelson*, 24 U.S.C.M.A. 49, 51 C.M.R. 143, 1 M.J. 235 (1975).

[28]2 M.J. 116, 119 (CMA 1977).

[29]3 M.J. 282 (CMA 1977).

[30]Id at 286, footnote 8. See also, *U.S.* v. *Morales*, 23 U.S.C.M.A. 508, 50 C.M.R. 647, 1 M.J. 87 (1975).

[31]3 M.J. 9 (CMA 1977).

[32]Id at 10, footnote 3.

[33]5 M.J. 382 (CMA 1978).

[34]5 M.J. 31 (CMA 1978).

[35]Id at 33.

[36]5 M.J. 104 (CMA 1978).

[37]Id at 105.

[38]5 M.J. 832 (ACMR 1978).

[39]5 M.J. 785 (ACMR 1978).

[40]3 M.J. 1075 (ACMR 1977).

[41]6 M.J. 758, 760 (ACMR 1978).

[42]*U.S.* v. *James*, 5 M.J. 382 (CMA 1978). *U.S.* v. *Montgomery*, 5 M.J. 832 (ACMR 1978). *U.S.* v. *Clark*, 5 M.J. 785 (ACMR 1978).

[43]*U.S.* v. *Clark*, 5 M.J. 785 (ACMR 1978).

[44]*U.S.* v. *Dixon*, 17 U.S.C.M.A. 423, 38 C.M.R. 221 (1968).

[45]MCM, 1969, para. 53c and 137.

[46]MCM, 1969, para 56e. See also, *U.S.* v. *Rosser*, 6 M.J. 267 (CMA 1979).

[47]*U.S.* v. *Graves*, 23 U.S.C.M.A. 434, 437, 50 C.M.R. 393, 396, 1 M.J. 50, 53 (1975).

# United States v. Ezell: Is the Commander a Magistrate? Maybe

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In *United States v. Ezell*,[1] the long awaited shoe has fallen. After pondering the question for more than three years,[2] the United States Court of Military Appeals[3] has decided that commanders may continue to make probable cause search determinations and authorize searches of areas within their control. While commanders may breathe a sigh of relief that the ceiling did not fall in,[4] they must still keep a wary eye on the widened cracks in their authority resulting from the *Ezell* decision. While the commander is not *per se* disqualified from acting as a magistrate in search questions, his qualifications are suspect and must be carefully scrutinized in each case.[5] Thus, *Ezell* raises problems which promise to plague commanders, counsel, and the courts for some time.

This article will examine the *Ezell* decision and its practical consequences. In addition, some suggestions for the future development of this area of the law will be made.

## I. The Ezell Decision.

*United States v. Ezell* actually involves four cases.[6] Ultimately the result in each turns on its own facts, but before reaching these particulars CMA addressed several more general questions.[7] All three judges agreed that: 1) the Fourth Amendment[8] applies to the military;[9] 2) authority to determine probable cause and to authorize searches thereon has been properly conferred on commanders by the President;[10] and 3) despite their subordination to the President and their inherent interest in and responsibility for law enforcement, commanders are not automatically disqualified from being 'neutral and detached' magistrates.[11]

Beyond this, CMA's unanimity quickly erodes however, and as it does the command-

er's powers become less certain. The court reaffirmed the rule that the neutrality and detachment of a commander who authorized a search may be reviewed in any case,[12] but the criteria laid down in *Ezell* are much stricter than was true previously. Furthermore, Chief Judge Fletcher, while concurring in *Ezell*, suggested that in future cases he would also consider whether a commander referred ". . . his decision to search . . . for review and action by a military judge when available,"[13] in deciding whether a search was properly authorized. Thus, the commander's power to authorize searches is restricted by *Ezell*, and hints about additional limitations are raised as well. Careful examination of *Ezell* will help to identify guidelines as to when commanders may act as magistrates, although the degree of certitude desired on the matter will seldom be assured in advance.

The majortiy in *Ezell* described several activities which will disqualify commanders from acting as magistrates. These include: 1) "obtaining information to be used as a basis for requesting authorization," and "involvement in the information gathering process;"[14] and 2) actual presence during the search "except in very extraordinary situations."[15] The majority's treatment of each of the four cases decided in *Ezell* provides some amplification of these and other guidelines.

In three of the four cases, CMA found that the commander who authorized the search was not neutral and detached. In *United States v. Boswell,*[16] the authorizing commander, Major Moi, was disqualified because he personally conducted the search and because his testimony at trial reflected a law enforcement bias in relation to Boswell's case.[17] The majority also noted that Major Moi had had prior dealings with the informant in the case and had previously administered nonjudicial punishment to Boswell. The extent to which the latter two factors were relied upon by the majority in its holding in *Boswell* is not clear.[18] In *United States v. Sanchez,*[19] Major Dube, Sanchez' commander, was found to have shed the mantle of neutrality and detachment by ordering and prescribing the procedures for a drug detection dog walk-through of the barracks, and by participating in the walk-through himself.[20] In *United States v. Brown,*[21] Colonel Wehling, the base commander, was held not to have been neutral and detached because he had: 1) approved a proposal by investigators to use a particular informant on the base to make controlled buys; 2) approved equipping the informan with electronic listening devices; and 3) received frequent reports on the informant's activities, including several personal interviews with the informant at which Colonel Wehling instructed the informant on future actions.[22] In addition, in *Brown* the majority found a separate disqualifying factor in Colonel Wehling's attempt to grant immunity to the informant in return for his cooperation.[23]

On the other hand, in *United States v. Ezell* itself,[24] Lieutenant Colonel Cross, Ezell's battalion commander was found sufficiently neutral and detached. LTC Cross qualified even though he was generally aware of Private Ezell's possible involvement in earlier illegal activities, and despite the fact that LTC Cross had previously recommended that Ezell be eliminated from the service for unsuitability.[25] The majority emphasized that LTC Cross took no part in gathering the information that established probable cause in the instant case.

As a general proposition, then, a commander may not act as a magistrate when he has acted, or is about to act, like a police officer.[26] It is important to note that the court does not condemn such law enforcement activity or suggest that it is improper. It merely says that when a commander acts in this manner, he may not *also* act as magistrate. Thus, the test is not whether the commander has exceeded the bounds of his role as a commander. Instead his activities will be compared to those typically performed by a civilian police officer; if the two are analogous then the commander may not authorize a search.[27] Conversely, actions by a commander which do not have an analog in a civilian setting do not necessarily disqualify a commander even though they fall well outside the realm of activities performed by civilian magistrates.[28]

## II. The Response.

What will be *Ezell's* immediate effect on searches and seizures within the military? What steps are called for in order to meet its more stringent requirements for command authorized searches?

Undoubtedly *Ezell* will lead to greater uncertainty in the authorization process. Investigators, subordinates, and commanders themselves will frequently question not only whether there is probable cause, but who ought to decide. This is unfortunate, for the law of search and seizure is interwoven with enough uncertainty already,[29] without bringing one more element of doubt into the equation. In some, if not many, cases, this will lead to substantial delays in securing authorization in order to avoid possible challenges later on. At the same time, additional litigation of these questions will occupy the courts, especially while the new guidelines are unadorned with the gloss of judicial elaboration.

Despite the disruption *Ezell* is likely to entail, the initial response should be to focus on education and to avoid overreaction. Commanders should not be told that they should not engage in sorts of activities found to be disqualifying in *Ezell*, with one exception.[30] Initiation and direction of investigations into suspected criminal activities is a ligitimate command function. It would be folly for a commander to allow a possible crime problem to fester in his unit for fear of rendering himself unable to authorize a search later on.

Commanders should be fully educated concerning the *Ezell* decision, however.[31] The purpose here is not so much avoidance of possible disqualification as it is informing commanders that when they have engaged in conduct of a disqualifying nature, they should refer the probable cause determination to someone else.[32] At the moment of requested authorization, only the commander is sure to be aware of his previous actions in connection with the case. Only if he is also aware of potentially disqualifying (or nearly as important, not disqualifying) factors can he make a reasonably informed decision whether he should personally authorize the search. Of course, commanders should be advised that once they decide to authorize a search, under *Ezell* they must not be present at that search, barring truly extraordinary circumstances.[33]

To what extent should Chief Judge Fletcher's admonition that a commander should "refer his decision to search in the usual case . . . for review and action by a military judge where available"[34] be heeded? This statement is good advice. Commanders and other personnel, especially criminal investigators, should be made aware of the option of going to the judge and encouraged to do so where possible.[35] In the absence of any holding by CMA, or even an indication by a second judge of an intention to adopt such a rule, there appears to be no need to go beyond such encouragement however.

## III Beyond Ezell.

In his concurring opinion in *Ezell*, Chief Judge Fletcher suggests that a "reconsideration" of military search and seizure law is "imminent."[36] Accepting this as both true and desirable, closer examination of the doctrinal and practical aspects of *Ezell* is appropriate.

*Ezell* is the latest in a line of cases which have gradually assimilated the Fourth Amendment standards of the civilian community into the fabric of military practice.[37] Yet, at bottom *Ezell*, like its predecessors, tolerates a distinct departure from those standards.[38] The majority in *Ezell* acknowledges that

> [a commander's] duties provide the basis for a persuasive argument against the notion that he may at the same time be neutral and detached. Indeed, no official in the civilian community having similarly combined functions could qualify as a neutral and detached magistrate.[39]

Thus, under *Ezell* the protections afforded to servicemembers are extended to the limited degree that an official who by definition is not neutral and detached is disqualified from determining probable cause only when he manifests his lack of neutrality and detachment by specific acts in a given case. Query whether

this protection is worth the disruption and uncertainty it is likely to generate.[40]

The purpose of the requirement that probable cause be determined, and warrants issued, by a neutral and detached magistrate is essentially twofold. First, it is designed to maximize the quality of the probable cause decision by insuring that the arbiter has no partcular interest in the outcome.[41] In this way, unwarranted (in the nontechnical sense of that term) invasions of privacy will be kept to a minimum. Second, public confidence in government will be enhanced by such a requirement, and individuals subjected to searches will at least have the assurance in a warrant that law enforcement officials are not acting arbitrarily and that there are limits on what they can do.[42] The mechanism for enforcing the requirement that a warrant be sought whenever possible is, of course, the exclusionary rule.[43] Regardless of how much probable cause officials may have had, if they failed to secure a warrant when it was reasonably possible to do so, the exclusionary rule will normally be applied.[44]

The force behind these policies is somewhat diminished in the military. In the first place, the privacy interests in the military, particularly in the barracks,[45] are not as compelling as in civilian society.[46] Secondly, a servicemember's relationship with the commander is not the same as is a citizen's relationship with civilian law enforcement officials.[47] As far as criminal liability is concerned, however, it may be accepted that a servicemember is entitled to basically the same procedural protections that exist in civilian courts.[48]

This suggests that the locus of concern with the Fourth Amendment in courts-martial should shift from protection of privacy interests to its efficacy as a trail right.[49] If this is the case, then emphasis on the exclusionary rule as a prophylactic measure to enhance a general right to privacy is misplaced. In turn, concern over who determines the existence of probable cause, rather than whether it exists, also diminishes.[50] A different approach might therefore better effectuate the purposes of the Fourth Amendment in the military.

It is submitted that, except in rare cases, the activities of the authorizing official surrounding authorization of a search ought not to be a matter of concern in military courts.[51] In other words, if a commander has probable cause, or thinks he does, he should be able to authorize or conduct a search without worrying about whether he might be disqualified due to his performance of other legitimate command activities. His probable cause determination is still subject to review at trail, and is entitled to no special deference.[52] In order to facilitate such review, and therefore give meaningful effect to the rule, the commander should be required to reduce to writing the basis for the search (i.e., the information establishing probable cause), the object(s) of the search, and the place(s) to be searched, before the search is conducted.[53] Where a search is conducted without such documentation, compelling reasons must be demonstrated as justification for such an ommission.[54]

This approach will protect the integrity of the court-martial process at least as well as the *Ezell* rule, with fewer of the problems attending to it. This rule guarantees that evidence may not be used against service-members unless there was probable cause for its search and seizure. Such determination will ultimately be made by a judge, of course. The requirement that the search be supported by written documentation insures that an accurate picture will be presented on review.[55] The existence of this review requirement will also act as a strong deterrent to commanders who are assessing probable cause; a commander who views his information through the tinted visor of a policeman's helmet runs a substantial risk of reversal at trial.[56]

With this procedure, a commander retains control of his own organization. He, and others, need not dither over whether he is qualified to act on probable cause questions. True, his decisions on probable cause must meet certain standards, but that is true of decisions a commander makes in many contexts. At least he is not required to secure someone else's permission to fully investigate a matter within his own realm of responsibility. Concomitantly, he does

not suffer the loss of authority in the eyes of his troops that having to request someone else's permission to examine his own barracks would entail.

The requirement for written documentation will, it must be acknowledged, not go down easy with many commanders.[57] Yet it will not only protect the rights of individuals, but it will also result in greater convenience to the government.[58] Such documentation will substantially eliminate at trial such hazards as faulty memories and confusing accounts between various participants in the authorization process. In many cases it will make the commander's appearance as a witness at trial unnecessary.[59] Certainly the commander's prestige in his organization will not be reduced when documentation demonstrating that a search decision was reached as the result of careful deliberation is presented.

This rule would not significantly restrict any protections extended to servicemembers under *Ezell*. Recognizing, as *Ezell* does, that commanders are not neutral and detached, eliminating review of *manifestations* of the absence of neutrality and detachment will do little to reduce the quality of probable cause determinations. Likewise, recognizing, as most servicemembers do, that a commander is not neutral and detached in a magisterial sense, eliminating review of a particular commander's activities will not reduce the confidence of members of the military community in their government generally or their commanders specifically. The requirement for written documentation will do more to enhance these goals than will the *Ezell* standard.

## IV. Conclusion.

While *Ezell* does not completely tie the hands of commanders, it does snare them in one more legal entanglement. At the same time, because it treats only a symptom of the problem (or at least what the *Ezell* majority perceives to be a problem) its effectiveness as a protection for servicemembers amounts to little more than a fortuitous loophole for an occasional individual at best.

Chief Judge Fletcher's call for reevaluation of this area of the law is welcome. The times when a commander's discretion to search his barracks was unfettered are long gone, and despite the yearnings of some commanders, it must be conceded that they would not be tolerated for long in this day and age. This does not mean that the Fourth Amendment we know in civilian life should apply in the military without some consideration of the military's function and structure. An accommodation can be reached only by careful analysis of the goals of the Fourth Amendment as well as the realities of military life.

## Footnotes

[1] United States v. Ezell, 6 M.J. 307 (CMA 1979).

[2] Petitions for review on the question whether the commander qualifies as a neutral and detached magistrate were granted by the Court of Military Appeals as early as 1975.

[3] Hereinafter referred to as "CMA" or "the court" in text.

[4] There was cause for those opposed to limiting the commander's powers to be concerned. Aside from the court's general activism and tendency to limit commander's power in connection with military justice in recent years, [*see* Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977); Willis, *The United States Court of Military Appeals: Born Again*, 52 IND. L. REV. 151 (1976)] the court gave several specific hints that raised questions about the commanders authority in this area. Two judges questioned directly the neutrality and detachment of commanders. In United States v. Roberts, 2 M.J. 31 (CMA 1976) Judge Perry wrote:

> I do not share the assuredness expressed in the dissenting opinion that the unit commander in the military "has the power of a magistrate in the civilian community to authorize" searches. Wether such officer, by the nature of his position and duties, can be the neutral and detached magistrate constitutionally mandated is not a subject before this Court in the instant case.

*Id.*, at 32, n. 6. Chief Judge Fletcher has previously stated: "To this judge, when we say that commanders are acting in a neutral and detached capacity, we are prolonging a fiction." Fletcher, *The Continuing Jurisdiction Trial Court*, THE ARMY LAWYER, Jan 1976, at 5, 6.

In a related area, CMA had previously determined that commanders may not act as their own magistrates in deciding whether or not an accused can and should be placed in pretrial confinement. Courtney v. Williams, 1 M.J. 267 (CMA 1976). *See also* Porter v. Richardson, 23 C.M.A. 704, 50 C.M.R. 910 (1975); Milanes-Canamero v. Richardson, 23 C.M.A. 710, 50 C.M.R. 916 (1975); Phillippy v. McLucas, 23 C.M.A. 709, 50 C.M.R. 915 (1975).

On another plane, CMA construed Article 36 of the Uniform Code of Military Justice [10 U.S.C. 801-940 (1970); hereinafter cited as UCMJ or the Code in text, and U.C.M.J. in footnotes.] somewhat narrowly. *See, e.g.*, United States v. Larneard, 3 M.J. 76 (CMA 1977); United States v. Heard, 3 M.J. 14 (CMA 1977); United States v. Washington, 1 M.J. 473, 475, n. 6 (CMA 1976); *see also* United States v. Newcomb, 5 M.J. 4, 10-14 (CMA 1978) (Fletcher, C.J., dissenting). This narrow construction raised questions about the foundation for paragraph 152 of the MANUAL FOR COURTS MARTIAL, UNITED STATES, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969], one of the major planks on which the commander's authority to search has been thought to rest. By taking the position that paragraph 152 established substantive rules of search and seizure, rather than prescribing "procedure, including modes of proof, in cases before courts-martial" as Article 36 authorized the President to do, CMA could apparently leave the commander with little more than tradition to point to as the source of his authority to act as magistrate in search cases. *But see* n. 10 *infra*.

[5] The court had previously recognized that a commander may be disqualified from acting as a magistrate because of his own attitudes or involvement in a case. United States v. Guerrette, 23 C.M.A. 281, 49 C.M.R. 531 (1975); United States v. Staggs, 23 C.M.A. 111, 48 C.M.R. 672 (1974). *See also* United States v. Ness, 13 C.M.A. 18, 20, 32 C.M.R. 18, 20, n. 1 (1962); United States v. Sam, 22 C.M.A. 124, 46 C.M.R. 124 (1973). The test was not terribly strict however. To be disqualified, more than involvement in the investigation was required. *See* United States v. Guerrette, *supra;* United States v. Staggs, *supra*. Also, participation in the search itself did not disqualify the commander. *See* United States v. Murray, 12 C.M.A. 434, 31 C.M.R. 20 (1961). The test focussed more on a particular attitude of bias than on a commander's actions alone. *See* United States v. Staggs, *supra*. (Ironically, in *Staggs*, which is the only case in which CMA held a particular official disqualified for lacking neutrality and detachment, that official was a judge advocate to whom the power to authorize searches had been delegated.)

[6] United States v. Ezell, Docket No. 31,304; United States v. Boswell, Docket No. 32,414; United States v. Sanchez, Docket No. 33,326; United States v. Brown, Docket No. 33,679.

[7] As has been typical of CMA in search and seizure cases in recent years, each judge wrote an opinion in *Ezell*. [*See* United States v. Hessler, 4 M.J. 303 (CMA 1978) *pet. for reconsideration granted* 5 M.J. 277 (CMA 1978); United States v. Harris, 5 M.J. 44 (CMA 1978); United States v. Rivera, 4 M.J. 215 (CMA 1978); United States v. Roberts, 2 M.J. 31 (CMA 1976); United States v. Thomas, 1 M.J. 397 (CMA 1976).] In *Ezell* Judge Perry wrote the majority opinion, which was concurred in by Chief Judge Fletcher. In his own concurring opinion, Chief Judge Fletcher qualified his concurrence by indicating that he believes reevaluation of the law in this area is in order and further suggesting that he may apply a stricter standard than the one adopted in *Ezell* in future cases. *See* n. 36 and accompanying text, *infra*. Judge Cook concurred with the majority that the commander may act as magistrate for search authorization purposes, and he also agreed that a commander may be disqualified from so acting in specific cases. He dissented, however, from the majority's conclusion that three of the four commanders in the cases before the court lacked the requisite neutrality and detachment.

[8] U.S. CONST. amend. IV.

[9] There has been little question that the fourth amendment applies to the military, and indeed to commanders, since CMA's decision in United States v. Brown, 10 C.M.A. 482, 28 C.M.R. 48 (1959). The extent to which it applies has never been settled. *See, e.g.*, United States v. Roberts, 2 M.J. 31 (CMA 1976); United States v. Thomas, 1 M.J. 397 (CMA 1976); United States v. Unrue, 22 C.M.A. 466, 47 C.M.R. 556 (1973); United States v. Poundstone, 22 C.M.A. 277, 46 C.M.R. 277 (1973). *See generally* Gilligan, *The Fourth Amendment in Military Practice*, (August 1975) (Unpublished thesis in The Judge Advocate General's School Library); Webb, *Military Searches and Seizures-The Development of a Consitutional Right*, 26 MIL. L. REV. 1 (1964).

*Ezell* does little to resolve this issue. Judge Perry asserts that "the Fourth Amendment applies with equal force within the military as it does in the civilian community," United States v. Ezell, 6 M.J. 307, 315 (CMA 1979) (footnotes omitted), except "in those instances where the concept of military necessity was held to warrant inapplicability." *Id.*, at 313 (footnote omitted). Chief Judge Fletcher's point of departure with Judge Perry's opinion centers on "the implication of that opinion, namely, that a servicemember is entitled under the Fourth Amendment to a probable cause determination by a 'neutral and detached magistrate' as in the civilian community . . . ." Id., at 326. (Fletcher, C.J., concurring). Judge Cook does not directly address the extent to which the fourth amendment applies to the military in his opinion in *Ezell*. He implies that even assuming the fourth amendment applies to the military with full force, he percieves no violation of it in any of the cases in *Ezell*.

[10]The court was not unanimous in its identification of the doctrinal source from which it found this conferral to flow. Judge Cook perceived that such authority is among a commander's inherent powers. United States v. Ezell, 6 M.J. 307, 331 (CMA 1979). *See also* United States v. Roberts, 2 M.J. 31, 36 (CMA 1976) (Cook, J., dissenting); United States v. Miller, 1 M.J. 36f, 368 (CMA 1976) (Cook, J. dissenting). Judge Perry agreed with the argument that the commander's power is grounded in paragraph 152 of the MCM, 1969, which provides in pertinent part:

> The following searches are among those which are lawful. . . .
> A search of any of the following three kinds which has been authorized upon probable cause by a commanding officer, including an officer in charge, having control over the place where the property or person searched is situated or, if that place is not under military control, having control over persons subject to military law or the law of war in that place:
> (1) A search of property owned, used, or occupied by, or in the possession of, a person subject to military law or the law of war, the property being situated in a military installation, encampment, or vessel, or some other place under military control or situated in occupied territory or a foreign country.
> (2) A search of the person of anyone subject to military law or the law of war who is found in any such place, territory, or country.
> (3) A search of military property of the United States, or of property of nonappropriated fund activities of an Armed Force of the United States.

Judge Perry then examined the basis of paragraph 152 and concluded somewhat ambiguously:

> While there may be reasons to doubt that paragraph 152 of the Manual for Courts-Martial represents a proper exercise of the President's Article 36 powers, we shall consider the lawfulness of paragraph 152 as an exercise of the powers conferred upon the President by Article II of the Constitution of the United States as Commander in Chief of the Armed Forces.

*Id.*, at 317. Given Chief Judge Fletcher's restrictive view of the President's mandate under Article 36, [*see* United States v. Newcomb, 5 M.J. 4, 10–14 (CMA 1978) (Fletcher, C.J. dissenting)] it seems safe to assume that he had no doubt at all that paragraph 152 does not flow from that authority.

[11]The court rejected the contention that because military commanders are subordinate to the President, who is the highest law enforcement official in the land, they are disqualified from acting as magistrates. The court distinguished between the President's role as Commander in Chief, under Article 2, section 2 of the constitution, and his role as chief executive under section 1 of the same Article. Thus, cases disqualifying members of the executive branch of government from issuing search warrants, [*see, e.g.*, United States v. United States District Court, 407 U.S. 297 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971)] were distinguished.

CMA also noted that there is no requirement that a person issuing search warrants be legally trained. Shadwick v. City of Tampa, 407 U.S. 345 (1972). All that is required is that the issuing official be "(1) 'neutral and detached' as well as (2) 'capable of determining' the existence of probable cause to arrest or search." United States v. Ezell, 6 M.J. 307, 312 (CMA 1979). Applying these standards, the court found no blanket disqualification of commanders was necessary.

[12]*See* n. 5 *supra*.

[13]United States v. Ezell, 6 M.J. 307 330 (CMA 1979).

[14]*Id.*, 319. Included in these prohibitions are "such actions as approving or directing the use of informants, the use of drug detection dogs except in gate searches, the use of controlled buys, surveillance operations and similar activities." *Id.*

[15]*Id.*

[16]United States v. Boswell, Docket No. 32,414, 6 M.J. 307, 319–321 (CMA 1979).

[17]Major Moi testified that two weeks before the search in question he had "entered Boswell's room and caught Boswell and others in the midst of a 'pot party.' However, he stated, he 'blew that one' since he should have searched the room at the time." United States v. Ezell, 6 M.J. 307, 321 (CMA 1979). To what extent the issue here is purely a matter of semantics is difficult to discern. The term "blew that one" implies that the Major regretted missing a chance to catch the accused; it is indicative of one "engaged in the often competitive business of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). It is easy to imagine the Major describing the same events in less colorful terms, with different results as to this aspect of his disqualification. This serves to demonstrate the minutiae on which such questions can turn. A commander's articulateness, intelligence, and other character traits aside from those directly connected with any prejudice or bias he may or may not have will often be critical under the *Ezell* approach.

[18]These factors were given significance by virtue of the fact that Major Moi conducted the search personally. The majority commented: "By personally conducting the search and seizing the items whose admission was challenged, Major Moi revealed that he had been engaged in law enforcement activities throughout his participation in the entire authorization process." United States v. Ezell, 6 M.J. 307, 322 (CMA 1979). It does not appear that these factors, standing alone, would have disqualified Major Moi.

[19] United States v. Sanchez, Docket No. 33,326, 6 M.J. 307, 322-324 (CMA 1979).

[20] *See* notes 14 and 15 accompanying text *supra*.

[21] United States v. Brown, Docket No. 33,679, 6 M.J. 307, 324-325 (CMA 1979).

[22] Of the four cases, Brown best demonstrates how far the balance has swung against the commander. It is true that in civiilian practice the activities which disqualified Colonel Wehling are functions normally performed by law enforcement officials. Nevertheless, they are all functions which many civil libertarians would like to have a magistrate perform in a supervisory capacity. Judge Cook points this out in his dissent in *Ezell*. United States v. Ezell, 6 M.J. 307, 336 (CMA 1979). While it may be that Colonel Wehling performed these tasks with a zeal typical of a policeman, rather than the dispassionate detachment of a magistrate, CMA does not seem interested in any such distinction. These circumstances are the clearest indication that if the commander's actions *look* like police activity they will disqualify him. The majority is not concerned with how judicial and police functions in the civilian community might be, or should be, allocated, but with how they are in fact apportioned in today's society. Thus, after identifying a number of disqualifying acts at one point, Judge Perry wrote, "It is noted that there is no constitutional requirement for judicial approval of any of these activities before they may be conducted," *id.*, at 319, without pausing to examine whether judicial review of such activities might be desirable.

[23] United States v. Ezell, 6 M.J. 307, 324, n. 60 (CMA 1979). This seems appropriate since immunization of witnesses is clearly an executive function. *See* United States v. Alessio, 528 F. 2d 1029 (9th Cir. 1976), *cert. denied* 426 U.S. 948 (1976). In addition, Colonel Wehling's apparent predetermination of the credibility of the informant, by offering him immunity, would raise questions about his ability to weigh the information presented by the informant in determining probable cause. *Cf.* United States v. Dickerson, 22 C.M.A. 489, 47 C.M.R. 790 (1973); United States v. Sierra-Albino, 23 C.M.A. 63, 48 C.M.R. 534 (1974).

[24] United States v. Ezell, Docket No. 31,304, 6 M.J. 307, 319-320 (CMA 1979).

[25] Indeed, LTC Cross acknowledged that he would prefer ro see Ezell out of his unit, although he denied any personl bias against Ezell.

[26] *See* n. 23 *supra*.

[27] [W]he the military commander becomes personally involved as an active participant in the gathering of evidence or otherwise demonstrates personal bias or involvement in the investigative or prosecutorial process against the accused, that commander is devoid of neutrality and cannot validly perform the functions envisioned by paragraph 152 of the Manual for Courts-Martial.

United States v. Ezell, 6 M.J. 307, 318-319 (CMA 1979). The reference to participation in the "prosecutorial process" raises the question whether the commander can be disqualified 'after the fact' by such actions as preferring or referring charges. In the absence of more direct guidance from CMA it may be assumed that such activities are not disqualifying.

[28] Thus the actions of LTC Cross did not disqualify him, despite their incompatibility with the functions of most civilian magistrates.

[29] *See generally* Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Haddad, *Well Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. 198 (1977). *See also* Stone v. Powell, 428 U.S. 465, 537-542 (1976) (White, J. dissenting).

[30] *See text accompanying n. 33 infra.*

[31] Such education can be instituted at the local level through briefings by judge advocates and information papers on the *Ezell* decision. In the longer run, guidance from higher headquarters may be desirable, as would attention to this matter at service schools attended by commanders or potential commanders. [In conjunction with this, more emphasis might be laid on the substantive, and often rather technical requirements for establishing probable cause. It might be observed here that the practice of many commanders of consulting a judge advocate regarding the existence of probable cause may raise questions related to the issues addressed in *Ezell*. Frequently a commander with a question in this area contacts a trail counsel. Since the commander is acting in a judicial capacity, this may be improper. *Cf.* United States v. Payne, 3 M.J. 354 (CMA 1977) (holding that it was improper for trial counsel, who later prosecuted the case, to advise the Article 32 investigating officer on the duties he was to perform, particularly with regard to courses of action he might follow.)]

[32] Usually there is someone else available who can authorize a search. [If there is truly no one else under the circumstances, then it can reasonably be argued that the 'warrent' requirement is inapplicable. *Cf.* Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Garcia, 3 M.J. 927 (ACMR 1977). *But see* United States v. Kinane, 1 M.J. 309, 312-313 (CMA 1976).] Commanders should be made aware of who these people are and how they may be reached.

Many commanders resent asking someone else for permission to act in an area which they feel falls within their own responsibility. This is understandable, but the fact remains that *Ezell* has restricted the latitude previously accorded commanders. They can either engage in 'law enforcement' type activities or act as

magistrates, but not both. Since there is usually someone else available to act as magistrate, and since *initiation* of investigation of crime often falls squarely on the commander's shoulders, a commander ought to incline toward giving up his magisterial role rather than sacrifice supervision of enforcement of the law in his organization.

Delegation of authority to search is presently authorized by paragraph 152 of the MCM, 1969, and by precedent. United States v. Drew, 15 C.M.A. 449, 35 C.M.R. 421 (1965). This might be a possible solution under some circumstances. The extra cautious commander or judge advocate might note the vigorous dissent of Judge Ferguson in *Drew* however.

[33] United States v. Ezell, 6 M.J. 307, 319 (CMA 1979).

[34] United States v. Ezell, 6 M.J. 307, 330 (CMA 1979). Even this brief statement raises many questions. For example, does 'refer his decision . . . for review and action" mean seek the judge's permission or his advice? (Probably it means the former.) Does "where available" mean where one is stationed or where actually accessible under the circumstances? (Probably it means the latter.)

It is debatable how workable the requirement Chief Judge Flectch contemplates would be. Even assuming that all services empowered judges to issue search warrents, [only the Army and Coast Guard do so presently, United States v. Ezell, 6 M.J. 307, 325, n. 62 (CMA 1979)] many installations do not have a judge located on station. This in itself would lead to an undesirable checkerboard practice throughout the services. Moreover, the accessibility of judges would be a problem. The nature of most probable cause determinations in the military may be significant here. Although no statistics are available, it seems safe to say that most probable cause searches in the military are in barracks and have as their object drugs, weapons, or stolen property. Probable cause in this context is often of shortlived duration. Much different are the types of matters, such as organized criminal activities (including major drug and fencing operations, and gambling) of an ongoing nature, which seem to be the subject of many warrants in the civilian sphere. Thus, time is often very critical in military searches.

[35] Certain advantages inhere in going to a military judge under present practice when this is possible. Aside from virtually eliminating any question about the qualifications of the magistrate, the expertise of the judge should serve to reduce the chances of an erroneous decision on probable cause.

Experience teaches that many are reluctant to seek authorization to search from a judge even where time is available to do so. This is often due to the more cumbersome requirements of sworn affidavits, written warrants, and reporting requirements. *See* Army Reg. No. 27-10, Chap. 14 (C 17, 15 August 1977). Aside from the fact that these requirements benefit the government by insuring a permanent record of the grounds for the search, it seems unlikely that the commander's informal, streamlined procedures will survive for long in the wake of *Ezell*. CMA has long complained of the absence of any written record in search authorizations. United states v. Hartsook, 15 C.M.A. 291, 35 C.M.R. 263 (1965); United states v. Penman, 16 C.M.A. 67, 36 C.M.R. 233 (1966). The court presently has before it the question whether the commander's authorization and the underlying information must be written. United States v. Dillard, pet. granted 8 Nov. 1976, 2 M.J. 159, Docket No. 33,040.

[36] United States v. Ezell, 6 M.J. 307, 326 (CMA 1979) (Fletcher, C.J. concurring).

[37] Thus, although the military applied an exculsionary rule when the U.C.M.J. became effective [*see* MANUAL FOR COURTS-MARTIAL, 1951, paragraph 152] and had done so for nearly thrity years [*see* Dig. Op., JAG, Army, 1912–1940, p. 220, CM 165750] the power of commanders to search was virtually unrestricted. *See* MANUAL FOR COURTS-MARTIAL, 1951, paragraph 152. This power was described in one early case as "plenary." United States v. Worley, 3 C.M.R. (A.F.) 424, *quoted in* United States v. Florence, 1 C.M.A. 520, 523 5 C.M.R. 48, 51 (1952). CMA implied in early cases that there might be some limitations on a commader's power to search. *See e.g.*, United States v. Doyle, 1 C.M.A. 545, 548, 4 C.M.R. 137, 140 (1952):

> That there may be limitations upon the [commander's] power, we do not doubt. Insofar as the power bears on criminal prosecutions, both trial courts and appellate forums are available to insure that the commanding officer does not abuse his discretion to the extent that the rights of an individual are unduly impaired.

*See also* United States v. Florence, *supra* at 523, 5 C.M.R. 48, 51. However, there was no requirement for probable cause or anything appraching neutrality on the part of the commander as apredicate to the exercise of the commander's search powers.

In 1959 CMA for the first time imposed a requirement that a commander's authorization to search rest on probable cause. United States v. Brown, 10 C.M.A. 482, 28 C.M.R. 48 (1959). During the 1960's this requirement was repeatedly applied. *See, e.g.*, United States v. Ness, 13 C.M.A. 18, 32 C.M.R. 18 (1962); United States v. Battista, 14 C.M.A. 70 33, 33 C.M.R. 282 (1963); United States v. Davenport, 14 C.M.A. 152, 33 C.M.R. 364 (1963). Subsequently, the commander came to be compared to a civilian magistrate. *See* United States v. Hartsook, 15 C.M.A. 291, 35 C.M.R. 263 (1965); United States v. Davenport, *supra*. These and other decisions led the draftsmen of the 1969 Manual for Courts-Martial to incorporate the probable cause requirement, with most of its technical accoutrements [*see, e.g.*, Aguilar v. Texas, 378 U.S.

108 (1964); United States v. Ventresca, 380 U.S. 102 (1965); *but compare* United States v. Schafer, 13 C.M.A. 83, 32 C.M.R. 83 (1962) *with* Stanford v. Texas, 379 U.S. 476 (1965)], into paragraph 152. *See* Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, Dep't Army Pam. No. 27-2 (1970), pp. 27-41—27-42.

The 1970's saw a continuation of careful scrutiny of commanders' probable cause determinations. *See, e.g.,* United States v. Gamboa, 23 C.M.A. 83, 48 C.M.R. 591 (1974); United States v. McFarland, 19 C.M.A. 356, 41 C.M.R. 356 (1970); United States v. Llano, 23 C.M.A. 129, 48 C.M.R. 48 C.M.R. 690 (1974); United States v. Smallwood, 22 C.M.A. 40, 46 C.M.R. 40 (1972); United States v. Miller, 21 C.M.A. 92, 44 C.M.R. 146 (1971); United States v. Racz, 21 C.M.A. 24, 44 C.M.R. 78 (1971); United States v. Gill, 23 C.M.A. 176, 48 C.M.R. 792 (1974). There were occasional challenges of a commander's (or his surrogate's) neutrality and detachment, but these were relatively rare and even then seldom successful. *See* n. 5 *supra*. *See also* United States v. Carlisle, 46 C.M.R. 1250 (ACMR 1973) *aff'd* 22 C.M.A. 564, 48 C.M.R. 71 (1973); United States v. Bradley, 50 C.M.R. 608 (NCMR 1975). There were also expressions of doubt about a commanders' neutrality and detachment beyond those emanating from CMA's present membership. In United States v. Sam, 22 C.M.A. 124, 46 C.M.R. 124 (1973) CMA said:

> Although a commanding officer in determining whether to order a search in the military stands in the same position as a federal magistrate issuing a search warrant, common sense leads us to appreciate the difficulty he may tend to experience in viewing his decision with a magistrate's neutrality and detachment. Therefore, we must review his authorizations to search and seize with careful scrutiny.

Id., at 127, 46 C.M.R. at 127. The same sentiment was expressed more bluntly by Judge O'Donnell of the Army Court of Military Review in United States v. Withers, 2 M.J. 520 (ACMR 1976):

> The law permits a commanding officer to conduct and authorize searches within narrowly defined limits. In this capacity he has been likened to a "detached magistrate", although he is certainly no magistrate and generally has little if any detachment in the matter.

*Id.*, at 522.

[38] *See, e.g.,* United States v. Drew, 15 C.M.A. 449, 35 C.M.R. 421 (1965) (power to authorize searches may be delegated); United States v. Penman, 16 C.M.A. 67, 36 C.M.R. 223 (1966) (search authorization and information establishing probable cause need not be reduced to writing); United States v. Shafer, 13 C.M.A. 83, 32 C.M.R. 83 (1962) (requirement as to specificity of place to be searched substantially diluted); United States v. Sam, 22 C.M.A. 124, 46 C.M.R. 124 (1973) (acknowledging that commanders are not completely neutral and detached).

[39] United States v. Ezell, 6 M.J. 307, 318 (CMA 1978). Chief Judge Fletcher expressed his own misgivings more strongly:

> I believe it unnecessary as well as increasingly in contradiction of common sense to equate the military commander in his duty to produce an effective fighting force and his concomitant responsibility as the chief law enforcement official on a military installation to a neutral and detached magistrate within the meaning of judge or magistrate in the civilian society. Such a legal fiction is counterproductive in assessing the realities of military life and provides no viable standard for a determination of reasonableness under the Fourth Amendment.

*Id.*, at 328. Despite the majority's misgivings on this point, it was apparently willing to tolerate this deviation from civilian practice out of defense to its own precedents as well as to the president's assignation of this power to commanders. While the court did not expressly say so, it is probable that the court also considered the vacuum it would have created had it totally disqualified the commander and of the practical problems which would have resulted.

[40] *See* n. 29 and accompanying text *supra*.

[41] *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948); Coolidge v. New Hampshire, 403 U.S. 443, 450-451 (1971); United States v. United States District Court, 407 U.S. 297, 318-323 (1972); United States v. Chadwick, 433 U.S. 1, 9 (1977).

[42] Camara v. Municipal Court, 387 U.S. 523, 532 (1967); United States v. Chadwick, 433 U.S. 1, 9 (1977).

[43] Coolidge v. New Hampshire, 403 U.S. 443, 450-453 (1972).

[44] Agnello v. United States, 269 U.S. 20 (1925); Coolidge v. New Hampshire, 403 U.S. 443 (1972); United States v. Chadwick, 433 U.S. 1 (1977).

[45] A survey of CMA's decisions involving command authorized searches reveals that the overwhelming majority deal with searches in the barracks. All four of the searches involved in *Ezell* occurred in the barracks. Of course commanders have authority to order searches of other areas. MCM, 1969, paragraph 152 (4th Paragraph). Because most of the command authorized searches which have concerned appellate courts have been barracks searches, it may be that different rules should apply to barracks than apply to other living places such as individual or family housing and off post quarters overseas. The privacy interests involved appear substantially different. This article,

and the suggestions in it, does not attempt to draw such a distinction, however.

[46]It seems self evident that the actual expectation of privacy of occupants of a barracks is not the same as one would have in a civilian home. This stems not only from the fact that barracks living is more communal than other settings, but, more significantly, because barracks occupants have traditionally been subject to substantially more intrusion by government officials. *See* United States v. Gebhart, 10 C.M.A. 606, 28 C.M.R. 172 (1959); United States v. Grace, 19 C.M.A. 409, 42 C.M.R. 11 (1970); United States v. Tates, 50 C.M.R. 504 (ACMR 1975); United States v. Frazier, 49 C.M.R. 713 (ACMR 1975); United States v. Roberts, 2 M.J. 31, 36 (CMA 1976); Committee for G.I. Rights v. Callaway, 518 F. 2d 466 (D.C. Cir. 1975).

Part of the analysis regarding whether and to what extent the Fourth Amendment applies in a given situation must include not only what people's expectations *are*, but what we, as a society, think they *ought* to be. [*See* United States v. White, 401 U.S. 745, 786 (1971) (Harlen, J. Dissenting)]. Granting that in modern barracks, which often house individuals in 'private' or 'semiprivate' rooms or cubicles, some privacy rights which did not exist in years past must be recognized, there are still many factors which weight against equating a barracks to a home. A commander, while sometimes wearing a policeman's hat, is also a landlord as well as a tenant. In the eyes of the owner of the barracks, the United States Government, he is responsible for the physical plant and its contents. He must be able to insure that the property is being maintained properly. Moreover, he is responsible to the occupants of the barracks to provide them with a safe, secure, and reasonably pleasant environment in which to live. Most barracks occupants have no real choice as to where they will live, and they have no means to avoid one who plays his stereo too loud, who gets drunk and becomes noisy, abusive, or violent, who keeps his living area in an unsightly manner (such that it may cause odors, attract pests, or create a fire hazard), or who keeps weapons which may constitute a threat to other members of the unit. (Eviction of undesirable 'tenants' is seldom a viable response in the barracks.) In the barracks, the impact that one servicemember can have on other persons living or working there demands that a commander have authority to regulate behavior in ways not ordinarily acceptable in the civilian sphere.

A closely related matter is the effect of such close knit living on the dynamics of the group. Here the drug problem becomes particularly significant, although it is not the sole concern. Use of drugs in the billets affects not only those actually using the substances. In the milieu of the barracks, a wider circle of servicemembers will be exposed to such usage. If the commander is unable to effectively combat the problem, its apparent 'acceptability' along with peer pressures will likely spread the use of drugs to other servicemembers who might be able to resist such temptations were they not so immediate. Furthermore, if the commander *appears* not to be able to control a drug, or any similar problem, respect for the law generally and him specifically will diminish in the unit.

This is not to argue with a commander's power to search the barracks should be completely unrestrained, but only that expectations of privacy in the barracks are, and ought to be, less than they are elsewhere.

[47]*See* Parker v. Levy, 417 U.S. 733, 751 (1974):

> The availability of these lesser sanctions is not surprising in view of the different relationship of the Government to members of the military. It is not only that of law giver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner and law giver rolled into one. That relationship also reflects the different purposes of the two communities.

*See also* Bernard, *Structures of American Military Justice*, 125 PENN. L. REV. 307 (1976).

[48]*See, e.g.*, Westmoreland, *Military Justice - A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971); BISHOP, JUSTICE UNDER FIRE (1974).

[49]The Supreme Court has established that the exclusionary rule's purpose is to deter future improper invasions of privacy by government officials. Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974). Nevertheless, the fact that most searches and seizures (at least where questions of probable cause are involved) occur as part of the criminal process serves to conjoin one's privacy interest with an interest in not being 'unfairly' convicted with evidence which was obtained from him improperly. Conversely, courts of criminal jurisdiction have an interest in insuring the integrity of the criminal process at all stages. The exclusionary rule's origins reflect this approach. *See* Boyd V. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See also* Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975).

Neither CMA nor courts-martial, as courts of criminal jurisdiction, have the function or the means to regulate privacy in the barracks or elsewhere, beyond matters affecting the protection of trial rights. Thus, deterrence of improper invasions of privacy generally is not within the province of military courts. Instead their function is to protect military accuseds or potential accuseds from unfair investigative practices. Chief Judge Fletcher's approach in United States v. Thomas, 1 M.J. 397, 405 (CMA 1976) is an effort to accommodate this view. *See also* the opinions authored by Chief

Judge Fletcher in United States v. Jordan, 1 M.J. 145 (CMA 1975) *reconsidered* 1 M.J. 334 (CMA 1976). *See* Cooke, *supra* n. 4 at 150-151.

[50] If we are concerned with protection of a fair trial interest rather than a privacy right as such, then an after-the-search review of probable cause by a military judge (at an adversarial, as opposed to an *ex parte* proceeding) will substantially protect that right.

[51] It may be necessary to fashion a prophylactic rule to deal with the rare situation where a commander's personal bias "shocks the conscience." What is contemplated here is not those situations in which a commander legitimately performs police-like actions and then authorizes a search, but rather the unusual instance where he steps out of his role of commander altogether.

[52] MCM, 1969, paragraph 152.

[53] This requirement could be established by CMA in a decision, or by regulation. Indeed, such a requirement presently exists in U.S. Army Europe, although it does not apply to barracks searches. Army Reg. No. 190-22 (12 June 1970), USAREUR Supp. 1 (11 July 1978). As noted above, *see* n. 35 *supra*, CMA presently has before it the issue of whether authorizations to search must be written. It seems likely that the court will impose such a requirement. It may be to the advantage of the services to tailor their own versions of such a rule first.

[54] There must be an 'exigent circumstances' exception to such a requirement, although judicial scrutiny will be necessary to insure that the exception does not swallow the rule. *Cf.* United States v. Chadwick, 433 U.S. 1 (1977). Consideration might be given to requiring a memorandum, prepared at the earliest opportunity, explaining why no writing was prepared in advance as well as the purpose of and reasons for the search, in those situations where no writing can be made in advance.

[55] Normally the government will be bound to the four corners of the documentation. Some may object that under the pressures of the moment essential information will be omitted from the written record. This should not happen if commanders are exercising the proper degree of care. Moreover, such mistakes are likely to be far fewer when the information is fresh than is the case with the present practice where memories have often dimmed in the weeks or months between search and testimony at trial.

A form for routine use in this matter might be helpful, but there should be no mandatory requirement for any particular form or format for the authorization.

The defense should be permitted to 'go behind' the written record of authorization in accordance with the standards set forth in Franks v. Delaware, ____U.S. ____ 98 S. Ct. 2674 (1978).

[56] *See* notes 49 and 50 *supra*.

[57] *See* n. 55 *supra*.

[58] Indeed, in its opinion in United States v. Dillard, 2 M.J. 955 (ACMR 1976) *pet. granted* 2 M.J. 159 (CMA 1976), the Army Court of Military Review ruled that a U.S. Army Europe requirement for written authorization to search existed *solely* for the benefit of the Government.

[59] Barring questions of the authenticity of the documents, or the rare case where the defense seeks to go behind the written authorization, there would be no need to call the commander in most cases. Of course, when a commander conducts the search himself he will usually relinquish this privilege.

# Standing Revisited

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## Introduction.

*Rakas v. Illinois*,[1] has altered the rules as to fourth amendment coverage and standing to contest illegal searches and seizures under the fourth amendment. An individual has standing to contest an illegal search or seizure on a number of alternative grounds: interest in the property searched;[2] presence at the site of the search; interest in the property seized; automatic standing;[4] and expectation of privacy. Another alternative has been adopted by some of the state and lower Federal courts: the "target" of the search theory.[5] The *Rakas* decision rejects the target of the search theory and sets forth in a five to four decision rules for reexamining the other alternative grounds for establishing standing.

Rakas and his companions were passengers in a car which was stopped as a result of an all points bulletin giving the description of a getaway car involved in a robbery. After the vehicle was stopped the occupants of the vehicle,

Rakas and his two companions, were ordered out of the car. After the occupants had left the car, two officers searched the interior of the car; in the interior they discovered a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger seat. The defendants were not the owners of the car nor did they proclaim that they were the owners of the sawed-off rifle or the shells. As a result of the search the defendants were charged with armed robbery. One of the grounds for allowing the defendant in *United States v. Jones* to have standing was that Jones was legitimately on the premises at the time of the search. The Court indicated that legitimate presence on the premises at the time of the search is not deemed controlling. Specifically, it was not controlling as to an automobile.

The requirement of standing to employ the exclusionary rule is not unique to the fourth amendment. This requirement is applicable generally to all constitutional issues.[7] To establish standing the individual must show that his or her fourth amendment rights were violated. As expressed in *Jones*,[8]

> [o]ne must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed to someone else.

The language "one against whom the search was directed" has been interpreted by at least one court to indicate the target of a search has standing. In *Rakas*, the Court expressly rejected the target of the search theory which had been impliedly repudiated in *Alderman v. United States*.[9] The support for this theory was based upon the aforementioned language in *Jones* together with the separate opinion of Mr. Justice Fortas in *Alderman* wherein he stated that *Jones*

> requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely to be "victim of an invasion of privacy" and a "person aggrieved", even though it is not his property that was searched or seized.[10]

This rejection of the target theory was under circumstances where there was no allegation of bad faith. One of the factors the Court has considered in determining the application of the exclusionary rule is the presence or absence of aggravating circumstances in making the search, seizure or arrest.[11] If there has been an intentional or reckless disregard of the fourth amendment rights, the Court has been more willing to suppress the evidence. But the dissent stated,

> [T]he ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterence of bad-faith violations of the fourth amendment . . . This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant.[12]

The danger from this type of action is at least overstated when one considers the Court's past examination of aggravating circumstances and the other alternatives that are available to the aggrieved party.

### Rakas Inquiry

Mr. Justice Rehnquist in writing the majority opinion isn *Rakas* indicated that there are two inquiries as to standing "first, whether the proponent of a particular violation of the fourth amendment has alleged an 'injury in fact,' and second, whether the proponent is asserting his or her own legal rights and interests rather than basing his own claim for relief upon the rights of third parties."[14] A two step inquiry. First, whether there was a violation of a legitimate expectation of privacy and second, was it a violation of the defendant's legitimate expectation of privacy. Simply, was there a violation of the defendant's "legitimate expectation of privacy."

It is curious that Justice White is a dissenter. His reasoning for dissenting in a fourth amendment case may be the same as in the past, his dissatisfaction with the exclusionary

rule and the "back door" method of limiting the rule. He states,

> If the Court is troubled by the practical impact of the exclusionary rule it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived is the correct results in specific cases.[15]

Essentially, he is arguing that the Court limits the right of privacy by not confronting the exclusionary rule headon. His argument might have strong logic in other factual situations but not in the instant case.

At least two persuasive arguments may be made as to the impact of *Rakas* on the right to privacy. First, that expressed by Justice White that the Court has rejected *Katz*. The second, the Court has redefined *Katz* as to future cases. Justice White considers the decision to be an affront to *Katz* and the right to privacy approach to the fourth amendment.

> We are not told, and it is hard to imagine anything short of a property interest that would satisfy the majority . . . . I had thought that *Katz* firmly established that the fourth amendment was intended as more than a simply a trespass law applicable to the government.[16]

This is an exaggeration. It would seem that the defendants would have standing if they could have established a reasonable expectation of privacy as to the area searched. The majority does not express this but it seems to be implicit in its language.

Without additional evidence, the trunk of an automobile, its locked glove compartment and the area under the passenger seat are not areas in which a passenger would normally have a legitimate expectation of privacy. An expectation of privacy might have been demonstrated by establishing that the defendants had ridden in the vehicle on numerous occasions. It might have been shown that while passengers they used the locked glove compartment and the area under the passenger seat as a place to store personal property such as wallets and purses.

The majority did not reject *Katz* but spoke in terms of the right to privacy. It explained *Jones* on the basis of the defendant's "legitimate expectation of privacy" since Jones had no property interest recognized at common law.[17] Whether there is a legitimate expectation of privacy is not dependent on criminal law cases. Reference must be made to "concepts of real or personal law or to understandings that are recognized and permitted by society."[18] These are not the only references. Reference must be made to the values and interests sought to be protected by the Founding Fathers.[19] These values and interests must be related to contemporary society.[20] Other factors are societal expectations,[21] the scope and nature of observation or intrusion, and a balance between the right to privacy and effective law enforcement.[22] All of the above must be considered not only as to standing but also in the fundamental question of fourth amendment coverage.

As to standing, the inquiry in *Rakas* could have different meanings: sole test for standing, test for standing as to vehicles, or test for standing for "legitimately on the premises." It may be that the inquiry will be applied to all standing issues. The inquiry being whether there has been a violation of the defendant's legitimate expectation of privacy. The interest in the property seized, or searched and legitimate presence on the premises may be a factor as to the defendant's legitimate expectation of privacy. The dictum in *Rakas* would seem to indicate the latter. This analysis of standing places it under the heading of "substantive fourth amendment doctrine" where it rightfully belongs and will place the question on "sounder logical footing."[23] As the Court stated, "We would not wish to be understood as saying that legitimate presence on the premises is irrevelant to one's expectation of privacy but it cannot be deemed controlling."[24] How the *Rakas* standard will be applied can be seen by looking at some hypotheticals.

**Legitimately on the Premises.**

The Court stated: "It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances."[25] The Court went on to say,

> But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place since they made no showing that they had any legitimate expectation of privacy in the glove compartment area or area under the seat of the car in which they were merely passengers.[26]

Even though this language of the Court is dictum, if one considers the rationale of the Court to return to the original question as to whether there was fourth amendment coverage as to the individual proponent claiming a violation of the right to privacy, the reasoning of the Court goes far beyond the holding. Thus where the concept of expectation of privacy was used in *Mancusi v. DeForte*,[27] to grant standing, it is now being reexamined to deny standing.[28]

In the military setting, assume that the defendant is in a companion's room when a military policeman or the commander enters the room illegally and searches the room including the hollow ends of the bunk of a companion and finds marihuana. Under the law prior to *Rakas* it could be argued that, since the defendant was legitimately in the room at the time of the search he had standing.[29] But the inquiry by the majority in *Rakas* indicates that the first inquiry is whether there was a legitimate expectation of privacy as to the hollow end of the bunk. One can for the sake of argument say, "Yes, there was a legitimate expectation of privacy as to the hollow portions of the end of a bunk," since one would expect that the room would be an area of privacy and part of the room would encompass the ends of the bunk.[30] The second inquiry is whether there was a violation of the defendant's expectation of privacy, clearly absent other evidence the defendant does not have a legitimate expectation of privacy as to the hollow poles on the end of a bunk. Thus one can see a change in the traditional rules as to standing.

Another hypothetical will also demonstrate the possible change. Assume that X is a visitor at the quarters of a friend on post. While there the police make an illegal search of the quarters of the house and find evidence that would aid in the criminal prosecution of the visitor in the bedroom. If there was no evidence that the visitor had permission to use the bedroom, the visitor would not have a legitimate expectation of privacy as to the search and seizure of evidence from that portion of the house even though the visitor was admittedly legitimately on the premises at the time of the search.

**Interest in the Property Searched.**

In *Rakas*, one of the factors the Court relied upon was that the petitioners did not assert a "possessory interest in the automobile." Again there may be some changes despite the holding. Assume that the defendant has given his issued duffel bag to one of his best friends for use so long as the owner was in Germany. But in the bottom of the duffel bag unknown to the companion, was stored some contraband. Again assume that the duffel bag was illegally searched by a commander. Applying the inquiry in *Rakas* as to whether there is an expectation of privacy by the friend that the police or government agents will not go into the duffel bag most people would agree the answer would be yes. But there would be no legitimate expectation of privacy by the defendant in the duffel bag even though he was the owner of the duffel bag.

**Interest in the Property Seized.**

Another factor relied upon by the majority in *Rakas* was that the petitioners did not claim an "interest in the property seized."[32] Assume that an individual has loaned his attache case to another clerk in the office because he has received a new one for Christmas. He tells the borrower that he may use the attache until the owner leaves that area on PCS. Assume there was an illegal search of the attache case resulting in the seizure of evidence against the owner. Does the owner have standing? Following the *Rakas* approach, one could argue that the owner did not have a legitimate expectation of privacy as to the attache case at the

time of the search. Absent such evidence of a legitimate expectation of privacy the owner would not have standing.

**Impact on Military**

The approach taken in *Rakas* should not surprise those in the military community. The Court of Military Appeals has already used the concept of expectation of privacy to deny standing. In *United States v. Simmons*, the Court held that the defendant did not have an expectation of privacy as to the gasoline can on the back of a government vehicle to object to a search of the can. This was an instance where the Court employed the concept to deny standing even though the defendant was legitimately present at the time of the search. The support for that decision plus the rationale in *Rakas* should result in innovative arguments as to whether the defendant has standing. One might seek to easily quell these arguments by pointing to paragraph 152 of the *Manual*. This paragraph seeks to set forth not only the application of the exclusionary rule to official misconduct, but also to state some of the bases for standing.[30a] The importance of the *Manual* provisions has raged in many different settings.[30b] The general rule is that if the *Manual* rule is ambiguous or was intended to set forth the federal rules then *Rakas* will apply to the military.[30c] If the rules set forth in the *Manual* are examined individually as to the various examples, one may find them ambiguous. Specifically, the accused has standing as to the search of "another's premises on which the accused was legitimately present."[30d] What does "legitimately present" mean? Additionally, the *Manual* sought to set forth the federal rules as they then existed.[30e] The example above was taken from *Jones*.[30f]

Other changes that may be forecast for the future include the legitimate expectation of privacy concept as to the question of coverage, and the factors set forth in *Rakas* as to the criteria to be employed.

To establish standing in the future the steps delineated in *Rakas* must be followed. The defendant must show that there was (1) violation of the defendant's (2) expectation of privacy. The traditional factors, presence at the site of the search and interest in the property searched or seized, will support or negate a violation of the defendant's expectation of privacy. If the *Rakas* inquiry applies to all questions of standing, it could have a drastic impact on automatic standing. Lastly, *Rakas* suggests changes as to coverage under the fourth amendment when the concept of legitimate expectation of privacy is employed.

**Footnotes**

[1] 24 Crim. L. Rptr. (BNA) 3009 (U.S., 5 December 1978).

[2] United States v. Mathis, 37 C.M.R. 797 (A.F.B.R. 1966), *aff'd. 16 C.M.A. 522, 37 C.M.R. 143 (1967). See also* Manual for Courts-Martial, United States ¶ 152 (Rev. ed. 1969).

[3] *See e.g.*, United States v. Yeast, 37 C.M.R. 890, 897 (A.F.B.R. 1966).

[4] Anderson, *Standing: The Aftermath of Harris*, 10 The Advocate 123 (1978).

[5] *See, e.g.*, United States v. Mapp, 476 F.2d 67, 71 (2d Cir. 1973).

[6] 362 U.S. 257 (1960).

[7] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968).

[8] 362 U.S. 257, 261 (1960).

[9] 394 U.S. 165 (1969).

[10] *Id.* at 173.

[11] United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590, 605 (1975); Wong Sun v. United States, 371 U.S. 471, 486 (1963).

[12] Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3009, 3020 (U.S., 5 December 1978).

[13] *See* Gilligan & Lederer, *Replacing the Exclusionary Rule with Administrative Rulemaking*, 28 ALA. L. REV. 533, 541-52 (1977).

[14] Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3009, 3012 (U.S., 5 December 1978).

[15] *Id.* at 3017.

[16] *Id.* at 3019.

[17] *Id.* at 3013-14.

[18] *Id.* at 3014 n.12.

[19] United States v. Watson, 423 U.S. 411, 429 (1976). Justice Powell concurring stated, "No historical evidence that the framers . . . were at all concerned about war-

rantless arrests by local constables and other police officials" existed.

[20] United States v. Chadwick, 433 U.S. 1, 9 (1977). The fourth amendment was intended to "safeguard fundamental values which would far outlast the specific abuses that give it birth."

[21] Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3009, 3013-14 n.12 (U.S., 5 December 1978).

[22] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). The Court balanced the "public interest" versus the "individual right to personal security free from arbitrary interference by law officers."

[23] Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3009, 3013 (U.S., 5 December 1978).

[24] *Id.* at 3015.

[25] *Id.*

[26] *Id.*

[27] Gilligan, *Expectation of Privacy: A Two Edged Sword As to Standing*, The Army Lawyer September 1973, at p. 4.

[29] *Cf.* United States v. Hernandez-Florez, 50 C.M.R. 243 (A.C.M.R. 1975). Defendant did not have standing to object to consenual search of the room even though legitimately present.

[30] United States v. Miller, 50 C.M.R. 303 (A.C.M.R. 1975), *aff'd*, 1 M.J. 367 (C.M.A. 1976).

[30a] Manual for Courts-Martial, United States ¶ 152 (rev. ed. 1969).

[30b] Gilligan, *Eyewitness Identification*, 58 Ml. L. REV. 183 192-93 nn. 62-3 (1972); Giannelli & Gilligan, *The Federal Rules of Evidence*, The Army Lawyer 12 (August 1975).

[30c] *Id. See also* United States v. Weaver, 1 M.J. 111 (C.M.A. 1975).

[30d] Manual for Courts-Martial, United States 152 (Rev. ed. 1969).

[30e] *Id. But see* United States v. Cordero, CM 437907 (A.C.M.R. 13 March 1979).

[30f] DA Pamphlet 27-2, Analysis of Contents of Manual for Courts-Martial, United States 1969, Revised Edition, 27-39 thru 40 (July 1970).

[31] *Cf.* Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973) (standing found under similar circumstances), cited in Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3014 n.12 (U.S., 5 December 1978). *But see* Northern v. United States, 455 F.2d 427 (9th Cir. 1972) (no standing under similar circumstances), cited in Rakas v. Illinois, 24 Crim. L. Rptr. (BNA) 3009, 3014 n.12 (U.S., 5 December 1978).

[32] Rakas v. Illinois, 24 Crim. L. Reptr. (BNA) 3009, 3015 (U.S., 5 December 1978).

[33] 22 C.M.A. 288, 46 C.M.R. 288 (1973).

# The Role of the Military Lawyer in the Risk Management of Patients

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There has in recent history been an increase in the publication of articles which address the issue of how to best cope with a real or potential medical malpractice claim. Taking the view that preventive law is preferable to stamping out brush fires this author takes the position that the military lawyer must not only take appropriate action at the moment a claim arises, but also must play an active role in preventing the causes of such claims.

For over a decade medical malpractice litigation has been on a dramatic increase in the medical profession as a whole. Department of Defense medical hospitals have not been immune from this trend. The following statistics will illustrate the scope of this problem:[1]

**CASES IN LITIGATION AWAITING TRIAL DATE**

| | April | June | June | Feb | Dec |
|---|---|---|---|---|---|
| *AGENCY* | 75 | 76 | 77 | 78 | 78 |
| Air Force | 68 | 82 | 96 | 105 | 126 |
| Army | 48 | 55 | 68 | 81 | 83 |
| Navy | 67 | 75 | 99 | 120 | 131 |
| Bureau of Prisons | 26 | 41 | 56 | 63 | 72 |
| HEW | 77 | 86 | 97 | 107 | 112 |
| VA | 207 | 255 | 286 | 343 | 378 |
| Miscellaneous | 3 | 4 | 9 | 9 | 25 |
| TOTAL | 496 | 598 | 711 | 828 | 927 |

### Role of the Military Lawyer

Clearly then a strong good faith effort must be made to stem the rising tide of medical malpractice within the military hospital. Notice that this author used the term "medical malpractice" as opposed to "medical malpractice claims." It is impossible to preclude the filing of spurious claims and litigation. However, it is within the power of the military lawyer with initiative to grapple with some of the root causes of medical malpractice itself even though he or she has no actual patient contact.

The military lawyer is in a unique position of being able to act as staff or house counsel to all military medical personnel assigned to the treatment facility. Counsel must initiate his own program of education and motivation of the medical staff so that they understand and appreciate the very real problems of malpractice. By and large most of the medical staff at any military treatment facility will have cursory knowledge of the scope of today's malpractice crisis. Most health care personnel are vaguely aware that they are personally immune from liability. The basis for this is of course Public Law 94-464 which makes the Federal Tort Claims Act the exclusive remedy for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedical or other supporting personnel, including medical and dental technicians, nursing assistants, and therapists of the armed forces, while acting within the scope of his duties. With this provision in mind, the natural reaction is for health care personnel to perform their various professional functions and let the lawyers worry about any litigation which might arise.

Depending upon the type and size of any given military medical treatment facility there may or may not be a prescribed system of risk management or patient safety. Such systems may be formal or informal and may range in scope and fosuc from credentials committees, peer review committees, incident reporting, medical records/audit committees to relying merely on a facility's professional expertise and morals. There may be little or no reliance on legal counsel in the field of risk management. It will be up to the military lawyer in most instances to offer his professional services to the treatment facility commander. This author's experience has been that once approached on the subject of risk management by legal counsel, military medical personnel are willing and pleased to accept guidance. As a general rule there is not the antipathy between the medical and legal professions within the military as one sometimes finds in the civilian sector. The command and staff of military medical treatment facilities generally recognize that the military lawyer shares the same goals of the medical personnel and is one who should be trusted. Therefore once assistance in risk management is proffered it is more than likely graciously accepted.

### The Risk Management Concept

In implementing a successful risk management legal orientation the military lawyer must strive for simplicity. Even though his assistance will be well received, the everyday demands of patient care will severely curtail the accessability of legal counsel to the medical personnel. For this reason it is necessary to focus on those areas of health care which carry a high risk of potential malpractice. In this manner the limited resources of both the medical and legal staff will be utilized most effectively. Because military medical treatment facilities differ in size and structure each risk management legal orientation must be adapted to the unique characteristics and requirements of the individual facility.

As a general rule, however, the hospital services which are most susceptable of medical malpractice because of the nature of high risk treatment which is administered will be found in obstetrics and gynecology, surgery, anesthesiology, pediatrics, radiology and oncology. Although not immune from mishap and litigation the areas of dentistry, pharmacy and immunology present a lower risk profile.

The lesson plan should at a minimum address the following issues:

a. The current state of the medical malpractice crisis.

b. The root causes of medical malpractice.

c. Specific actions which medical personnel should take in an effort towards risk management.

d. Motivation of medical personnel engaged in risk management.

There are several reasons which might give rise to an allegation of medical malpractice. Generally speaking any given reason will be based either on professional incompetence as evidenced by human error (even physicians commit these from time to time) such as misdiagnosis, failure to follow care, taking of inadequate medical history, etc., or on poor personal relationships with a patient such as a physician or nurse being arrogant, cold or unapproachable. Physicians and nurses are not immune from the physical and psychological diseases of alcoholism and drug abuse that may in turn cause carelessness in the performance of their duties. The manpower resources available to the military medical establishment are finite and indeed are decreasing. Unfortunately the number of patients in need of health care does not automatically decrease at a comparable rate. Physicians and nurses are people and overworked people can and do make mistakes. Medicine is a fast paced profession and those people engaged in the healing arts who do not engage in continuing medical education will soon find themselves professionally obsolete. As the state of the art of medical knowledge and practice and procedure increases so does the legal standard of care increase. The educationally obsolete physician or nurse is a prime candidate for an allegation of medical malpractice.

Other causes of allegations of medical malpractice may take the form of inadequate communication with other physicians, misunderstanding hospital rules, overstepping authority, inadequate consultation, foreign bodies left inside patient at surgery and proof of or failure of sterilization by surgery.

Medical personnel should therefore be encouraged by legal counsel to identify and quickly remedy the problem areas listed above. They should be instructed to be cautious in counselling patients so that an overstatement as to the prospects of a good result are not made. If the patient is led down a primrose path and eventually finds himself in a less than promised condition he will be more in a frame of mind to seek legal redress than he would have been if his hopes had not been dashed. Physicians and nurses must be encouraged to communicate with each other and to legibly and timely document such communication. This will help to insure that all members engaged in a particular case will know what is required, thus aiding good patient care, and the record in the event of a claim or litigation will aid in a legal defense. Physicians and nurses must be advised of the need to maintain a high level of professional expertise. They must at a minimum be cognizant of the hospital rules and their limits of authority.

The military lawyer may find it advisable to proffer several hard and fast rules which may help physicians and nurses avoid malpractice claims and render high quality patient care. For example, in a session with medical personnel the military lawyer should explain that they must:

1. Never sign a consultation sheet without examining the patient.

2. Never disclose any medical information about a patient without that patient's prior written consent.

3. Always review the patient's medical history, laboratory and physical data prior to performing any critical treatment or diagnostic procedure.

4. Always secure competent consultation with other physicians in controversial or difficult cases and record these consultations.

5. Always record what is told to a patient regarding morbidity, mortality and expected treatment.

6. Always avoid mere casual consultations

with physicians, nurses, patients and members of the patient's family.

7. Always seek a legal opinion if indicated.

Military medical personnel may be properly motivated once they realize that the information put forth by legal counsel makes for high quality medical care as well as legal practice and that the sound procedures maintained by them in the military will most likely follow them into civilian practice when they will be in a position of being personally liable for their acts of malpractice.

### Conclusion

This author believes that a program of continuing medical-legal education may prove to be one of the military hospital's best weapons against liability. Such education may alter poor medical practice and thus avert one of the main causes of medical malpractice claims. It is hoped that a designated legal counsel within each command be tasked with the duty of aggressively implementing such a program. One thing is certain, the trend of rising malpractice claims will not simply vanish. It is time that the military lawyer play an active role in preventive law.

### Footnote

[1] Statistics furnished by the Department of Legal Medicine, Armed Forces Institute of Pathology, Washington, D.C.

## Personal Office Management

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The purpose of this article is to point out and help to solve a problem which confronts many new lawyers. That problem is "How to effectively manage my own personal office and the work that passes through it." Courses are conducted at the JAG School and articles are often written on managing an entire law office, including such topics as "Word Processing," "Inter-personal relationships," etc. There is, however, noticeably less material on managing one's own work product.

Before I came into the JAG Corps, I had been a full-time student. I was well versed in handling the academic routine. This, however, in no way prepared me for the deluge of paper work which inundated me once I started work. DF's, TWX's, inclosures, Summary/Fact sheets, memoranda and other strange documents pounced on this unwary novice. My desk top became such a resting place for paper work that law dictionaries would sink into the morass, never to be seen again. As a result, upon my departure from my first post, my cowokrers gave me a "Cluttered Desk" Award commemorating my "continued effort to completely cover the top of his desk, filing cabinets, chairs and selected areas of the floors surrounding his desk."

After that award, I realized that hard work and knowledge of the law were not enough if you lost or temporarily misplaced the item you were supposed to be working on. I resolved to do better in my second assignment. After reading what I could find on the subject and "fine tuning" it to a JAG Office, I learned that a few simple rules immensely facilitate the handling of paper work. The following principles and techniques work well for me. They may seem outrageous to others and are offered only as food for thought.

Your desk top is the area where most of your office work will be done. Keep it clear of any extraneous material. The more material on the desk the less room to work. The less room to work the more paper work has to be put in piles. The more piles the more work is lost or temporarily misplaced. The surrounding

office—including the contents of the desk—should be designed and stocked to facilitate the work that goes on at the desk top.

Start by clearing the desk top completely. Once it's cleared, decide what should go on it.

**1. Your telephone.** An indespensible time saver. Attach a telephone cradle to the receiver to free your hands for other work while speaking on the phone. Other items however which are integrally connected with the telephone need not be on the desk. These include lists of telephone numbers.

From my experience, most numbers that JAG's call are numbers that they know from memory or that are already on their desks—contained in a DF or letter that they are responding to or a "return call" note. A list of phone numbers should be kept in the top desk drawer nearest the phone. Other prime candidates for that drawer should be a post phone directory, a local phone book, a major command phone book, the JAG directory, a local phone book, a major command phone book, the JAG directory, DOD directory and if necessary a state directory of state agencies and offices. This places all numbers in one convenient area and will save time.

If you have a movable glass top on your desk, put an organization chart under it. This will provide you with ready access to the names, phone numbers and organizations of a great number of the people you will deal with. If you don't have a glass top, place such a chart on a nearby wall for easy viewing or keep one in the same drawer with the telephone material.

**2. Pen sets.** Apparently every JAG officer has at one time or another been presented with a pen set. Such items certainly are not necessary for a desk top. (Most lawyers seem to keep pens in their pockets or in their center desk drawer.) Be that as it may, most of us succumb to the temptation of showing to the world that someone sometime thought enough of us to present us with a gift. Consequently, these presents are usually prominently displayed on the center edge of our desks. Fine—but one is enough. There is no need for that to be duplicated by one or more scattered around the desk.

**3. Name plates.** A definite necessity in this age of row upon row of identical government desks, chairs and partitions. Besides they usually don't take up too much room and are usually placed close to the rim of the desk top which is not generally used as a work space anyway.

**4. In and out boxes.** An absolute necessity. The best way of effectively managing paper work. The system works even better if a third box is added marked "Hold" or "No Suspense Date." This box should be used for items of interest or general reading which need not be worked on expeditiously. (This does not mean this box can be used as a burial ground for circulating material such as the office reading file.) Boxes should be appropriately marked to avoid personnel placing material in the wrong box. To eliminate this happening, the Hold box should be reviewed at least twice weekly.

Once work has been placed in the in Box it should only move to two other places on the desk, the center of the desk to be worked on and then to the out box. (I'm not counting the times, of course, when it will be necessary to take the material to the library or to other places.) Often if an item is being worked on, a matter comes in which demands immediate attention. Don't ever try to have two packets of paper work spread out on the desk at the same time. The papers will invariably become mixed up in the wrong group and possibly lost forever. Once the "rush job" arrives, gather up the material you were working on, put it in a folder and place it back in the in box to be worked on at a later date. This same rule applies if a client arrives. Not only does a clean desk top give the impression that you're giving the client's problem your undivided attention, but it saves time and trouble in case the client gives you a wad of papers to be examined.

Most of us on frequent occasions do place matter in our desks rather than in the in box because its FOUO or otherwise sensitive. Make it a habit to put it in only one drawer and check that drawer every morning. ("Out of sight, out

of mind" is very true. Once put in the drawer, it's very often not seen again for weeks or months.)

**5. Note books.** One note book should be on the desk, not an assortment of different size and colored pads. This note book should be mobile; it should not just *lay* on your desk. It should be taken to all meetings, both formal and informal. Before going to the meeting job down what you want to discuss. At the meeting, note what actions are to be taken, thoughts that occur and facts that are presented. Once back at the office, make sure that the actions to be taken are noted on your calendar for follow-up action. The use of this note book illustrates one clear principle: "never rely on memory alone—write it down."

**6. Calendar.** A wonderful companion to the note book and an excellent way to plan for the future. (Things to do tomorrow or on 17 Nov; to remind yourself of important dates, meetings and deadlines and keep a record of time spend on certain projects.) You don't need those large "executive" type. The smaller versions (such as stock item number FSN 7530-01-022-3568) work fine and don't take up so much room on the desk.

Once these items are on the desk, notice what is not there:

a. Pictures of family, executive "toys" and statues. Such items might be great for one's mental health, but they do clutter the work area. They should be put on a nearby book case or table where they can be easily seen without interfering with work.

b. Legal Pads. Valuable items but not something that should be on the desk. Keep them in the drawer within easy reach. Keep at least two sizes, one large size for writing rough drafts of memorandums, letters, and a smaller size for short notes and messaged.

c. Books. The desk top is not a book case. Books should be close enough to allow easy reach. The books that are used most often should be close enough to be reached even if one is talking on the telephone.

d. Receptacles for pencils, paper clips, etc. Completely unnecessary. All government desks have compartments in the center drawer for such items.

I have already mentioned some of the items that should be in the desk rather than on, phone directories, pads, pens, etc. These, of course, are obvious choices. The contents of the desk are up to the individual lawyer and are not subject to the same critical review that the desk top receives. The drawers however should not be so stocked or arranged that they hamper the work flow. (For example, the drawers should not be so full of old *Sports Illustrated* that it's difficult to find a pad.)

Some of the particular items that I have discovered to be extremely useful are:

a. List of acronyms and abbreviations frequently used Army wide and command wide.

b. List of birthdays of the officer personnel. An excellent way to show appreciation and help office morale is to remember a birthday.

c. Shoe and brass polish. Wonderful for those sudden meetings with the General or Chief of Staff.

d. List of Army regulations, and, in particular, local regulations that impact in the specific area (Administrative Law, etc.) you are working in.

e. A card file. Keep a file comprised of index cards on certain topics you have worked on. Don't reinvent the wheel every time. If you come across a good case or TJAG opinion on constructive possession or on-post solicitation, put it on a card for future use. Use your own index system[1] or simply use a table of contents of the Manual for Courts-Martial, Legal Assistance Handbook, Chapter 8 of the Administrative Law Handbook as the system. To save time, divide the card file into general topic areas, such as Criminal Law, Legal Assistance, etc.

f. File folders in the desk serve two purposes. First they can be used to supplement the card file. Articles, memoranda, etc., that deal with a particular subject are kept together in

one file for easy reference. (If a particular file becomes too voluminous it can be placed in a 3-ring binder and stored on a nearby book case.) Secondly, they can be working files for on-going projects, such as court-martial cases, child abuse councils, etc. (These files, however, should not be duplicative of the office general files.) With these working files kept in the drawer, the "out of sight; out of mind principle" must be guarded against. The JAG must rely on his memory and (hopefully) his well-kept note book and calendar to make sure no work "slips through the crack."

g. Book cases. Books should, as I've said, be arranged so that they are within easy reach. Books that one deals with the most should be positioned so they can be reached even if one is on the phone. The books should be grouped according to subject (Criminal Law, etc.) and appropriately marked. Many people place their DA Pamphlets in 3-ring binders and simply mark the binders with the number of the pamphlets. As a result, they may have no idea of what's really inside the binder. The October 1978 issue of *The Army Lawyer* should be handy since that issue has an index of all The Army Lawyers—an invaluable reference tool. Similarly, issues of *The Military Law Review* which contain indices, especially volume 81, the cumulative index, should be marked to facilitate research.

Finally, there is one marvelous piece of office equipment which should be kept handy and used often—the waste basket. If an item has any possible further use, either file it or dispatch it to the proper person. If not, then throw it away. (It's amazing how many desks have two or three used, disposable coffee cups on them.)

This method is not unique, infallible or perfect. It is, however, workable. Feel free to adopt, adapt, and/or reject as you wish.

### Footnotes

[1] For example, see: Hogan, Henry J., Title Filing: A system of Maintaining the Military Lawyer's Professional Papers, AL June 1975 at 17.

## ANCOES Selection and Board Reflections

*MSG Robert L. Williams,*
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As a voting member on the FY80 Advanced Non-Commissioned Officer Education System (ANCOES) Selection Board, which convened 3 April 79 and adjorned 27 April 1979, I would like to pass on a few comments concerning the selection process; a brief view of the OMPF; and an overall observation of what I saw concerning the E6 records that were viewed for selection.

First and foremost, I would like to assure you that, in my honest opinion, the process we used for selection to ANCOES is pretty much in line with the selection process used for promotion to E7, E8, and E9, and that the Army definitely selects according to the "Whole Person Concept" doctrine.

Fortunately, I had the additional task of drafting the afteraction report for the President of the board. I collected most of my data and comments from each panel and board member. The board members were carefully selected, and consisted of 24 highly qualified, handpicked Master Sergeants, Command Sergeants Major, and Lieutenant Colonels.

Although there is nothing secret about the board selection process, the MILPERCEN Letter of Instruction (LOI) is marked for Official Use Only (FOUO), and the contents within it are treated as such until the list of selectees is published.

The LOI provides each member with strict guidelines and DA policies to follow when

making the selections (such things as weight control, medical fitness, EER's etc.). It also tells us the number to be selected within each career management field (CMF). In addition to the LOI guidelines, the Mar-Apr 1978 issue of Commanders Call Booklet (Path to the Top), article by CSM Faulkner, pretty much sums up how the board works.

### Official Photographs

Photos are a big problem area. Some of the more common problems are:

1. A significant number of full-length photos were missing.

2. Most were of poor quality on fiche, particularly for blacks.

3. In many cases, year and month photo taken appears in block 67, section V, DA Form 2; however, no photo appears on the fiche.

The photograph is an important consideration when considering the total person for advanced education, promotion, etc.

### OMPF

Most of the 71D's records reviewed were generally in excellent shape. Each individual should be made more aware of the importance of his/her OMPF and the possible consequences of a lack of concern or neglect. There were several comments made by personnel officers concerning the reasons for servicemembers not reviewing their DA Form 2–1. Too many had negative overtones which may or may not be the case (i.e. servicemember refused to update DA Form 2–1 or servicemember not available).

The USAEREC normally screens an individual fiche for prohibited material. There were several records where they had either failed or overlooked prohibited items on the record. For instance, letters of reprimand had been filed which did not contain the signature of a general officer. This is prohibited by AR 600–37. Therefore, one should carefully review his or her fiche.

### Recommendations to Board Presidents

Although letters of recommendations from supervisors or commanders to board presidents are no longer authorized, nor will they be filed in the OMPF, an individual may write a letter to the president of the board pointing out any matters that are on file. I encourage each individual to write a letter to the president. These letters are read and given top consideration.

Recommend the individual send a copy of his awards certificate along with a copy of his orders to USAEREC. The awards certificate is more impressive and provides a narrative of what the individual is cited for. The orders are hard to read and time consuming.

Each servicemember should check his or her photo for presentability before it is sent to USAEREC. Too many times the servicemember relies on the photo facility and never sees the results of the photo. Sometimes there are uniform discrepancies, such as buttons left unfastened etc. The photo plays a significant part in the selection process.

### Note To Raters & Indorsers

In general, many, if not most officers and enlisted personnel do not know how to complete the EER/SEER's professionally. It appears that additional emphasis needs to be placed at the reviewer and personnel officer level to insure that reports are completed properly. EER/SEER's should include a summary of disciplinary action during the rated period and correlation to the "Behavior on and off duty" score. Low scores on the efficiency reports with no narrative are practically worthless as a tool. There were at least four records where an individual received a total score of 70 with no narrative. High or low scores on EER/SEER's should be reasonably justified.

The career development portion of the EER/SEER (narrative portion), if not completed, could hamper the soldier's chances for selection. This section is very important since letters of recommendations to board presidents can no longer be filed in the servicemember's OMPF.

33

## Professional Responsibility

The Judge Advocate General's Professional Responsibility Advisory Committee recently reviewed findings by an investigating officer appointed under the provisions of AR 15-6 that the OIC of a Branch Legal Office affixed the special court-martial convening authority's signature to several administrative and court-martial related documents, and that he was negligent in handling controlled substances used as evidence in courts-martial.

The Committee considered whether the attorney's conduct was consistent with the following Disciplinary Rules (DR) of the ABA Code of Professional Responsibility:

(1) DR 1-102(A)(4): A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(2) DR 1-102(A)(5): A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

(3) DR 7-106(C)(7): In appearing in his professional capacity before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence.

Captain A, the respondent in this case, served as the legal advisor to Colonel X, who was a special court-martial convening authority. Sometime in September 1977 Captain A discussed by phone with Colonel X a bar to reenlistment submitted by one of Colonel X's subordinate commanders. At the time of this conversation Colonel X was involved in Reforger Exercises. The bar to reenlistment contained numerous errors, requiring its return for corrections. Captain A had prepared a letter for Colonel X's signature which returned the bar action to its originator. Captain A's position was that he had permission to sign Colonel X's name on the letter, and he did so.

Colonel X remembered the incident, but believed the action involved was a pretrial confinement order. He also stated that he did not authorize Captain A to use his, Colonel X's signature. Colonel X recalled having said "sign the paper for me and down on the bottom indicate that this is my personal decision." Colonel X stated that he never directly or indirectly gave Captain A authority to use his signature in any fashion.

Following the incident in September, Captain A gradually developed the belief that he was authorized to sign Colonel X's name at will and without prior approval. During the period from September 1977 to August 1978, Capatin A signed Colonel X's name as special court-martial convening authority to numerous documents, including general court-martial forwarding recommendations, pretrial agreements, and convening authority actions. On numerous occasions he signed Colonel X's name openly in the presence of others and frequently stated that he had such authority. He made no effort to conceal his action.

The principal justification for Captain A's conduct was a reduction in processing time. He also employed another device to reduce processing time. Following completion of a record of trial by the court reporter, the record was forwarded to the military judge for authentication; then on to the defense counsel; and finally returned to the convening authority for his action. In an effort to reduce reported processing times, Captain A occasionally directed the court to predate the convening authority's action to coincide with the date of the judge's authentication. In at least one case which was processed in this manner, the record was returned to Captain A by the Division Staff Judge Advocate Office, because the convening authority's action was dated prior to the time the record was reviewed by the defense counsel. It also appeared that several final actions were taken on records of trial without the convening authority having seen the record.

During the course of the investigation into Captain A's conduct, it was discovered that his handling of evidence used in courts-martial was improper. In one case he left drugs unsecured in his desk drawer for at least two weeks fol-

lowing the trial. There was also testimony by Specialist Six B, a court reporter, that Captain A occasionally left evidence unsecured in his office prior to trial.

The Committee concluded from the submitted file and Captain A's sworn testimony at the investigation that he improperly sought Colonel X's permission to sign Colonel X's name on various documents. Based on what Captain A unreasonably interpreted to be approval from Colonel X, Captain A developed the belief that he had authority to sign Colonel X's name at will. The actual signing of Colonel X's name by Captain A on the court-martial related documents was in direct contravention of paragraphs 33*i*, 84*a*, and 89*a*, *Manual for Courts-Martial*, 1969 (Revised edition) and paragraph 2-3*b*, AR 27-10. Such conduct violates DR 1-102(A)(4) and DR 1-102(A)(5).

Testimony concerning Captain A's mishandling of evidence prior to trial was determined to be inconclusive. His handling of evidence following at least one trial was negligent. However, the Committee concluded that his isolated incident did not constitute a violation of DR 7-106(C)(7).

In his action on the Committee's findings and recommendations, The Judge Advocate General approved so much of the findings as provided that Captain A violated DR 1-102(A)(4) and DR 1-102(A)(5) by signing the convening authority's name to various court-martial documents, disapproved the finding that Captain A predated the convening authority's actions because of inconclusive evidence, and directed that Captain A be counseled regarding the seriousness of his conduct.

## 1979 Law Day Observances

Law Day USA was observed by the United States Army on 1 May 1979. Law Day was first established by presidential proclamation in 1958 to foster respect for law and to increase understanding of the place of law in American life. The nationwide celebration of Law Day USA is sponsored by the American Bar Association in cooperation with state and local bar associations, and many national organizations including the Army Judge Advocate General's Corps.

By letter to all staff judge Advocates dated 16 February 1979, The Judge Advocate General urged support for the 1979 Law Day program. After action reports were received from 37 CONUS Army installations and 26 overseas organizations.

Law Day proclamations, various kinds of displays, extensive media coverage, programs for elementary, junior high, and high school students, essay and poster contests, and a wide variety of social events were used to make thousands of servicemembers and their families aware of the meaning of Law Day 1979.

Highlights of some Law Day programs including the following. Mock trials were used to demonstrate the operation of law in the courtroom for elementary and secondary school students at Fort Belvoir, VA; Fort Meade, MD; Fort Riley, KS; Schofield Barracks, HI; HQ, USAREUR, Heidelberg, Germany; HQ, Eighth US Army, Korea; and HQ, Eighth Infantry Division, Baumholder, Germany. MG Alton H. Harvey participated in Law Day activities at Fort Campbell, KY, where he spoke at a Law Day luncheon with major unit commanders. The installation commander and staff judge advocate of Fort Leavenworth, KS, hosted a reception and buffet for members of the ABA Standing Committee on Military Law, which was attended by Chief Judge Albert B. Fletcher, Jr. and Judge William O. Cook of the Court Military Appeals and MG Wilton B. Persons, The Judge Advocate General of the Army. A Law Day luncheon at Fort McClellan, AL, featured MG Hugh Clausen as guest speaker, while MG (ret.) George Prugh spoke at a luncheon at the Presdio of San Francisco, CA. A series of twelve videotapes entitled

"Children and the Law" was provided to elementary school students by the Office of the Staff Judge Advocate, US Army Japan. An information booth was manned by personnel of the Office of the Staff Judge Advocate, 21st Support Command, Kaiserslautern, Germany. COL Joseph Donahue, Chief Judge, Fifth Judicial Circuit, spoke at a banquet in Karlsruhe, Germany. Included in the audience were members of Germany's two highest courts.

Many staff judge advocate offices obtained materials from the American Bar Association for distribution in connection with their Law Day observances. Other offices participated in Law Day sermons or other religious observances at post chapels. Many overseas offices coordinated their observances with and invited participation from officials of their host governments.

The extensive and varied observances of Law Day 1979 demonstrate continued concern for this significant legal observance.

## Labor Law Item
## Labor and Civilian Personnel Law, OTJAG

### Labor Counselor Coordination

With the passage of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111, it has become even more important for establishment and maintain the close liason and working relationship with the installation CPO, labor relations specialist, and EEO officials. New developments arising out of the creation of a statutory Federal labor relations system, the Merit Systems Protection Board, and the Office of Special Counsel (whose authority in "Whistleblower" cases is very broad), will cause the Labor Counselor's services to be in even greater demand. Close, effective working relationships between the labor counselor, CPO, and EEOO will minimize problem areas and permit an orderly transition into the new systems.

## Reserve Affairs Items

*Reserve Affairs Department, TJAGSA*

### 1. Law School Liason Program

The Law School Liaison Officer is a program established by The Judge Advocate General whereby designated reserve component Judge Advocates serve as a liaison to one or more law schools. These liaison officers contact prospective law students and newly admitted attorneys and provide information concerning the Judge Advocate General's Corps, active and reserve. Effective 1 July 1979, Law School Liaison officers receive retirement points for liaison activities pursuant to Rule 17, AR 140-185.

The following is a list of law schools which presently do *not* have a designated liaison officer.

*Arizona*
University of Arizona
College of Law
Tucson, AZ 85721

*California*
University of California
School of Law
Boalt Hall
Berkeley, CA 94720

California Western School of Law
350 Cedar Street
San Diego, CA 92101

Golden Gate University
School of Law
536 Mission Street
San Francisco, CA 94105

University of San Francisco
School of Law
Kendrick Hall
San Francisco, CA 94117

University of Santa Clara
School of Law
Santa Clara, CA 95023

Stanford School of Law
Standford, CA 94305

University of Southern
California Law Center
University Park
Los Angeles, CA 90007

*Colorado*

University of Denver
College of Law
200 West 14th Avenue
Denver, CO 80204

University of Colorado
School of Law
Boulder, CO 80309

*Connecticut*

University of Connecticut
School of Law
Greater Hartford Campus
West Hartford, CT 06117

Yale Law School
127 Wall Street
New Haven, CT 06520

*Delaware*

Delaware Law School
Widener College
2001 Washington Street
Wilmington, DE 19802

*Florida*

University of Florida
College of Law
Gainesville, FL 32611

Stetson University
College of Law
1401 61st Street, South
St. Petersburg, FL 33707

*Georgia*

Emory University
School of Law
Atlanta, GA 30322

University of Georgia
School of Law
Athens, GA 30602

Mercer University
Walter F. George School of Law
Macon, GA 31207

*Hawaii*

University of Hawaii
School of Law
1400 Lower Campus Road
Honolulu, HI 96822

*Idaho*

University of Idaho
College of Law
Moscow, ID 83843

*Illinois*

Illinois Institute of Technology
Chicago-Kent College of Law
77 South Wacker Drive
Chicago, IL 60606

Southern Illinois University
School of Law
Carbondale, IL 62901

*Kentucky*

Northern Kentucky University
Salmon P. Chase College of Law
1401 Dixie Highway
Covington, KY 41011

*Louisiana*

Southern University
School of Law
Southern Branch Post Office
Baton Rouge, LA 70813

Tulane University
School of Law
New Orleans, LA 70118

*Massachusetts*

Northeastern University
School of Law
400 Huntington Avenue
Boston, MA 02115

Western New England College
School of Law
1215 Wilbraham Road
Springfield, MA 01119

*Michigan*

Detroit College of Law
136 East Elizabeth Street
Detroit, MI 48201

*Missouri*

University of Missouri
School of Law
5100 Rockhill Road
Kansas City, MO 64110

St. Louis University
School of Law
3642 Lindell Boulevard
St. Louis, MO 63108

Washington University
School of Law
Lindell and Skinker Boulevards
St. Louis, MO 63130

*Montana*

University of Montana
School of Law
Missoula, MT 59801

*Nebraska*

Creighton University
School of Law
2133 California Street
Omaha, NE 68178

*New Mexico*

University of New Mexico
School of Law
1117 Stanford
Albuquerque, NM 87131

*New York*

Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

New York Law School
57 Worth Street
New York, NY 10013

Syracuse University
College of Law
Ernest I. White Hall
Syracuse, NY 13210

*Ohio*

Case Western Reserve University
School of Law
11075 East Boulevard
Cleveland, OH 44106

University of Cincinnati
College of Law
301 Taft Hall
Cincinnati, OH 45221

Cleveland State University
Cleveland—Marshall College of Law
Cleveland, OH 44115

University of Dayton
School of Law
300 College Park Drive
Dayton, OH 45469

Ohio Northern University
Claude W. Pettit College of Law
Ada, OH 45810

University of Toledo
College of Law
2801 West Bancroft Street
Toledo, OH 43606

*Oregon*

Lewis and Clark College
Northwestern School of Law
10015 S.W. Terwilliger Boulevard
Portland, OR 97219

*Pennsylvania*

Duquesne University
School of Law
600 Forbes Avenue
Pittsburgh, PA 15219

University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19174

University of Pittsburgh
School of Law
3900 Forbes Avenue
Pittsburgh, PA 15260

*South Dakota*

University of South Dakota
School of Law
Vermillion, SD 57069

*Tennessee*

Memphis State University
School of Law
Memphis, TN 38125

University of Tennessee
College of Law
1505 West Cumberland Avenue
Knoxville, TN 37916

Vanderbilt University
School of Law
Nashville, TN 37240

*Texas*

Baylor University
Law School
Waco, TX 76703

South Texas College of Law
1303 San Jacinto Street
Houston, TX 77002

Texas Southern University
Thurgood Marshall School of Law
3201 Wheeler Avenue
Houston, TX 77004

*Utah*

Brigham Young University
J. Reuben Clark Law School
Provo, UT 84602

University of Utah
College of Law
Salt Lake City, UT 84112

*Virginia*

University of Richmond
T. C. Williams School of Law
Richmond, VA 23173

*Washington*

Gonzaga University
School of Law
East 600 Sharp
Spokane, WA 99202

University of Puget Sound
School of Law
8811 South Tacoma Way
Tacoma, WA 98499

University of Washington
School of Law
Condon Hall
1100 N.E. Campus Parkway
Seattle, WA 98195

*West Virginia*

West Virginia University
College of Law
Morgantown, WV 26506

*Wyoming*

University of Wyoming
College of Law
P. O. Box 3035
University Station
Laramie, WY 82071

Reserve Component Judge Advocates who desire to participate in this program should contact Captain James E. McMenis, Reserve Affairs Department, phone 804-293-6121.

## 2. MOBILIZATION DESIGNEE VACANCIES

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Lieutenant Colonel William Carew, Reserve Affairs Department, Charlottesville, Virginia 22901. Current positions available are as follows:

| GRD | PARA | LIN | SEQ | POSITION | AGENCY | CITY |
|---|---|---|---|---|---|---|
| CPT | 52B | 03 | 01 | Asst SJA-DC | USA Garrison | Ft Stewart |
| CPT | 03D | 05 | 02 | Asst SJA-DC | USA Garrison | Ft Stewart |
| CPT | 03D | 05 | 01 | Asst SJA-DC | USA Garrison | Ft Stewart |
| CPT | 52C | 01 | 01 | Asst SJA | USA Garrison | Ft Stewart |
| CPT | 03E | 03 | 01 | Asst SJA | USA Garrison | Ft Stewart |
| CPT | 52C | 01 | 01 | Asst SJA | USA Garrison | Ft Stewart |
| MAJ | 03E | 01 | 01 | Chief | USA Garrison | Ft Stewart |
| MAJ | 03D | 01 | 01 | Ch, Crim Law | USA Garrison | Ft Stewart |
| CPT | 01H | 02A | 01 | Judge Advocate | Ft McCoy | Sparta |
| CPT | 01H | 02A | 02 | Judge Advocate | Ft McCoy | Sparta |
| CPT | 01H | 02A | 03 | Judge Advocate | Ft McCoy | Sparta |
| CPT | 01H | 02A | 04 | Judge Advocate | Ft McCoy | Sparta |
| CPT | 01I | 02 | 01 | Mil Af Le Ast Of | Ft McCoy | Sparta |
| CPT | 01I | 02 | 02 | Mil Af Le Ast Of | Ft McCoy | Sparta |
| CPT | 08 | 03A | 01 | Asst JA | 172d Inf Bde | Ft Richardson |
| CPT | 08 | 03A | 02 | Asst JA | 172d Inf Bde | Ft Richardson |
| CPT | 57 | 02A | 01 | Asst SJA | 172d Inf Bde | Ft Richardson |
| CPT | 03B | 05 | 01 | Defense Counsel | USA Garrison | Ft Devens |
| CPT | 03B | 03 | 01 | Trial Counsel | USA Garrison | Ft Devens |
| CPT | 03C | 06 | 01 | Admin Law Off | USA Garrison | Ft Devens |
| CPT | 03D | 01 | 01 | Asst SJA, Claims | USA Garrison | Ft Devens |
| MAJ | 03C | 02 | 01 | Ch, Admin Law Off | USA Garrison | Ft Devens |
| CPT | 02B | 04 | 01 | Asst JA | 1st Inf Div | Ft Riley |
| CPT | 02C | 02 | 01 | Asst JA | 1st Inf Div | Ft Riley |
| MAJ | 02A | 02 | 01 | Ch, Def Counsel | 1st Inf Div | Ft Riley |
| MAJ | 02B | 02 | 01 | Asst JA | 1st Inf Div | Ft Riley |
| MAJ | 02B | 03 | 01 | Ch, Legal Asst | 1st Inf Div | Ft Riley |
| CPT | 03B | 02 | 03 | Defense Counsel | 101st Abn Div | Ft Campbell |
| CPT | 03A | 02 | 04 | Trial Counsel | 101st Abn Div | Ft Campbell |
| CPT | 03C | 02 | 01 | Asst SJA | 101st Abn Div | Ft Campbell |
| CPT | 03A | 02 | 01 | Trial Counsel | 101st Abn Div | Ft Campbell |
| CPT | 03B | 02 | 01 | Defense Counsel | 101st Abn Div | Ft Campbell |
| CPT | 03B | 02 | 02 | Defense Counsel | 101st Abn Div | Ft Campbell |
| CPT | 03B | 02 | 04 | Defense Counsel | 101st Abn Div | Ft Campbell |
| MAJ | 03B | 01 | 01 | Ch, Def Counsel | 101st Abn Div | Ft Campbell |
| MAJ | 03A | 01 | 01 | Ch, Trial Counsel | 101st Abn Div | Ft Campbell |
| MAJ | 03C | 01 | 01 | Ch, Admin Law | 101st Abn Div | Ft Campbell |
| CPT | 03B | 03 | 03 | Defense Counsel | 5th Inf Div | Ft Polk |

| GRD | PARA | LIN | SEQ | POSITION | AGENCY | CITY |
|---|---|---|---|---|---|---|
| CPT | 03B | 04 | 02 | Trial Counsel | 5th Inf Div | Ft Polk |
| CPT | 03B | 03 | 01 | Defense Counsel | 5th Inf Div | Ft Polk |
| CPT | 03B | 03 | 02 | Defense Counsel | 5th Inf Div | Ft Polk |
| CPT | 03B | 04 | 04 | Trial Counsel | 5th Inf Div | Ft Polk |
| CPT | 03B | 03 | 04 | Defense Counsel | 5th Inf Div | Ft Polk |
| CPT | 03B | 04 | 03 | Trial Counsel | 5th Inf Div | Ft Polk |
| MAJ | 03B | 02 | 01 | Ch, Trial Counsel | 5th Inf Div | Ft Polk |
| MAJ | 03C | 01 | 02 | Asst SJA | 5th Inf Div | Ft Polk |
| MAJ | 03B | 01 | 01 | Ch, Def Counsel | 5th Inf Div | Ft Polk |
| CPT | 03D | 03 | 01 | Asst SJA | 9th Inf Div | Ft Lewis |
| CPT | 03F | 01 | 01 | Ch, Claims Br | 9th Inf Div | Ft Lewis |
| CPT | 03E | 03 | 01 | Legal Asst Off | 9th Inf Div | Ft Lewis |
| CPT | 03D | 02 | 01 | Asst SJA | 9th Inf Div | Ft Lewis |
| CPT | 03E | 03 | 02 | Legal Asst Off | 9th Inf Div | Ft Lewis |
| CPT | 21J | 01 | 01 | Judge Advocate | 9th Inf Div | Ft Lewis |
| LTC | 03A | 01 | 01 | Ch, Crim Law Br | 9th Inf Div | Ft Lewis |
| MAJ | 03B | 01 | 01 | Ch, Trial Counsel | 9th Inf Div | Ft Lewis |
| MAJ | 03E | 01 | 01 | Ch, Legal Asst Br | 9th Inf Div | Ft Lewis |
| MAJ | 03C | 01 | 01 | Ch, Def Counsel | 9th Inf Div | Ft Lewis |
| MAJ | 03D | 01 | 01 | Ch, Admin Law Br | 9th Inf Div | Ft Lewis |
| CPT | 28C | 03 | 01 | Defense | USAAD Cen | Ft Bliss |
| MAJ | 28D | 03 | 01 | Admin Law | USAAD Cen | Ft Bliss |
| MAJ | 28D | 02 | 01 | Proc/Fiscal Law Off | USAAD Cen | Ft Bliss |
| MAJ | 28B | 02 | 01 | Mil Justice Off | USAAD Cen | Ft Bliss |
| MAJ | 28B | 04 | 01 | Trial Counsel | USAAD Cen | Ft Bliss |
| CPT | 04 | 08 | 01 | Asst SJA | USA Garrison | Ft Sam Houston |
| CPT | 04 | 08 | 02 | Asst SJA | USA Garrison | Ft Sam Houston |
| CPT | 62C | 05 | 01 | Asst Crim Law Off | FORSCOM | Ft McPherson |
| LTC | 05B | 03 | 02 | Clms JA | USA Claims Svc | Ft Meade |
| LTC | 05B | 02 | 01 | Deputy Chief | USA Claims Svc | Ft Meade |
| LTC | 05B | 03 | 01 | Claims JA | USA Claims Svc | Ft Meade |
| CPT | 04B | 02A | 02 | Asst JA | USA Garrison | Ft Meade |
| LTC | 12 | 01 | 01 | JA | ARNG ISA Cp | Atterbury |
| MAJ | 12 | 02 | 02 | Asst JA | ARNG ISA Cp | Atterbury |
| MAJ | 12 | 02 | 01 | Asst JA | ARNG ISA Cp | Atterbury |
| LTC | 03 | 02 | 01 | Dep SJA | USA Garrison | Ft Hood |
| CPT | 04B | 04 | 01 | Admin Law Off | USA Inf Cen | Ft Benning |
| CPT | 04B | 07 | 01 | Legal Asst Off | USA Inf Cen | Ft Benning |
| CPT | 04A | 05 | 01 | Defense Counsel | USA Inf Cen | Ft Benning |
| CPT | 04B | 05 | 02 | Admin Law Off | USA Inf Cen | Ft Benning |
| CPT | 04A | 07 | 01 | Trial Counsel | USA Inf Cen | Ft Benning |
| CPT | 04B | 07 | 02 | Legal Asst Off | USA Inf Cen | Ft Benning |
| CPT | 04B | 07 | 03 | Legal Asst Off | USA Inf Cen | Ft Benning |
| CPT | 04B | 08 | 01 | Claims Off | USA Inf Cen | Ft Benning |
| LTC | 04B | 02 | 01 | Asst Ch, MALAC | USA Inf Cen | Ft Benning |
| LTC | 04A | 02 | 01 | Asst Ch, Mil Jus | USA Inf Cen | Ft Benning |
| MAJ | 04A | 03 | 01 | Sr Def Counsel | USA Inf Cen | Ft Benning |
| CPT | 03D | 01A | 01 | Asst JA | USA Garrison | Ft Sheridan |
| MAJ | 34 | 01A | 01 | JA E | USA Depot | Sacramento |

| GRD | PARA | LIN | SEQ | POSITION | AGENCY | CITY |
|---|---|---|---|---|---|---|
| LTC | 04H | 02 | 01 | Dep SJA | USA CERCOM | Ft Monmouth |
| MAJ | 04 | 01A | 01 | Asst SJA | Western Area MTMC | Oakland |
| MAJ | 03 | 04 | 01 | Asst SJA | USA Garrison | Ft Ord |
| MAJ | 03 | 04 | 02 | Asst SJA | USA Garrison | Ft Ord |
| MAJ | 03 | 04A | 01 | Legal Advisor | USA Garrison | Ft Ord |
| CPT | 03A | 04 | 02 | Defense Counsel | USA Garrison | Ft Ord |
| CPT | 03B | 02 | 01 | Asst SJA | USA Garrison | Ft Ord |
| CPT | 03B | 02 | 02 | Asst SJA | USA Garrison | Ft Ord |
| CPT | 03B | 02 | 03 | Asst SJA | USA Garrison | Ft Ord |
| CPT | 03B | 02 | 04 | Asst SJA | USA Garrison | Ft Ord |
| LTC | 26A | 01A | 01 | Legal Advr | USA TSARCOM | St Louis |
| CPT | 26A | 02B | 01 | Legal Advr | USA TSARCOM | St Louis |
| MAJ | 26C | 01A | 01 | Legal Advr | USA TSARCOM | St Louis |
| MAJ | 26D | 01A | 01 | Legal Advr | USA TSARCOM | St Louis |

2. Additional positions will be approved in the near future. Judge Advocates wishing to be considered for *any* available Mob Des position should so annotate DA Form 2976.

## Judiciary Notes

*U.S. Army Judiciary*

### DIGESTS—ARTICLE 69, UCMJ, APPLICATIONS

1. The case of *Cyr*, GCM 1979/4395, involved an interesting aspect of self-defense. In regard to an aggravated assault charge, the military judge gave the standard instruction dealing with the defense of another found in the Military Judge's Guide (paragraph 6-3, DA Pamphlet 27-9). The defense requested different instructions and contended that, as to the accused, a "reasonable man" standard should be superimposed onto the objective test of entitlement to use defense of another or prevention of a felony; that the principle of a "reasonable man" who can make a mistake of fact should apply. In essence, he urged that the accused should be able to defend himself at trial on *his* "mistake of fact" even though the facts later established that the accused was mistaken in *his* belief that the person he defended was not the aggressor, had withdrawn from the mutual affray, or had not used excessive force in his defense.

It was concluded that the military judge's instructions were correct. The military law is clear—the person who goes to the aid of another does so at his peril that the one he is defending was deserving of his efforts.

The applicant also contended that because he was relying on the principle of defense of another, a defense that requires that the actor "step into the shoes" of the one so defended, he was forced to call PFC F to show that PFC F was entitled to the defense of self-defense. Prior to trial, the convening authority refused to grant immunity to PFC F. At trial, the request was renewed. The military judge found that the convening authority had not abused his discretion in not immunizing the requested witness. She also determined that PFC F was unavailable to either side inasmuch as he would have invoked his Fifth Amendment privilege, if called as a witness, and would not have testified without a grant of immunity.

It was concluded that the decision as to granting immunity to PFC F was a matter

within the sound discretion of the convening authority. In the federal courts, the trial court does not have the power *sua sponte* to grant immunity to a witness, and the Government cannot be made to grant immunity to a witness in order that such witness can testify for the defense. United States v. Herman 589 F.2d 1191 (3d Cir. 1978); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966). Thus, a military judge does not have the power to grant testimonial or use immunity to a witness to obtain his testimony at trial. This authority has been specifically reserved to the convening authority.

Further, the convening authority did not abuse his discretion. The decision not to grant PFC F immunity was bottomed on the technical legal difficulties in granting him immunity, having him testify in the Cyr trial, and then trying PFC F after Cyr.

As to the production of PFC F, it was first noted that the accused did not present a synopsis of the expected testimony; he merely made a broad assertion that PFC F would testify as to his own self-defense. At the same time, the accused knew that PFC F would exercise his Fifth Amendment right not to incriminate himself and would not testify unless he was granted immunity. Hence, the materiality of PFC F's testimony could not be adequately measured. It was concluded that neither the convening authority nor the military judge abused his respective discretion in denying the production of PFC F. Relief was denied.

2. In the *Nash* case, SPCM 1979/4430, the applicant contended that the court-martial lacked jurisdiction to try him for bigamy because there was no service-connection under the criteria set forth in Relford v. Commandant, 401 U.S. 355 (1971).

The evidence of record showed that the accused married Ms. P on 21 January 1978. The ceremony was performed at the military chapel located at Davis-Monthan Air Force Base, Tucson, Arizona, an installation under military control. At the time of the marriage the accused was married to Mrs. N who was residing in Montgomery County, Ohio, where she had been since about August 1977.

During the period subsequent to the marriage ceremony on 21 January 1978, Ms. P obtained a dependent identification card. Since January 1978, she received medical treatment at the Fort Huachuca and David-Monthan Air Force Base hospitals for herself and her child on at least thirteen separate occasions. Also, she used the post exchange and commissary at Fort Huachuca.

The Judge Advocate General denied relief. Under the most accepted law, the offense of bigamy is committed when the second marriage has been ceremoniously completed. *See* Farwell v. Commonwealth, 189 S.E. 321 (Va. 1937). Hence, Nash's bigamous marriage was committed on a military installation, and no need would exist for a showing of service-connection. *See* United States v. Martin, 3 M.J. 744 (N.C.M.R. 1977); United States v. Fuller, 2 M.J. 702 (A.F.C.M.R. 1976).

Assuming, *arguendo*, that the "marriage contract" was not fully executed until a completion certificate from the attending religious or official entity was returned to the proper state authority, as required by many state statutes, service-connection nevertheless existed. There was a distinct military interest in this offense which was greater than and outweighed any civilian interest. The case of the United States v. Burkhart, 40 C.M.R. 1009 (A.F.B.R. 1969), was noted. There, the court concluded that the acceptance of Government benefits by the illicit wife was a flouting of military authority. United States v. Hadsell, 42 C.M.R. 766 (A.C.M.R.), is distinguishable. In that case, there was no evidence of record from which to infer that the second wife's consent to the marriage was premised on the acquisition of military benefits due to the accused's service status. In *Nash*, there was evidence that many Government benefits were utilized by the accused's putative spouse within a short period after the marriage ceremony. It is reasonable to infer that this may have been an element of consideration in her marriage to the accused.

## NON-JUDICIAL PUNISHMENT QUARTERLY COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH

JAN-MAR 1979

| | *Quarterly Rates* |
|---|---|
| ARMY-WIDE | 49.16 |
| CONUS Army commands | 50.82 |
| OVERSEAS Army commands | 46.55 |
| USAREUR and Seventh Army commands | 45.52 |
| Eight US Army | 66.79 |
| US Army Japan | 7.81 |
| Units in Hawaii | 48.62 |
| Units in Thailand | |
| Units in Alaska | 27.09 |
| Units in Panama/Canal Zone | 31.32 |

## QUARTERLY COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH

JAN-MAR 1979

| | *General CM* | *Special CM BCD* | *Special CM NON-BCD* | *Summary CM* |
|---|---|---|---|---|
| ARMY-WIDE | .44 | .30 | 1.02 | .71 |
| CONUS Army commands | .26 | .22 | .94 | .73 |
| OVERSEAS Army commands | .73 | .43 | 1.13 | .67 |
| USAREUR and Seventh Army commands | .92 | .46 | 1.11 | .53 |
| Eighth US Army | .21 | .56 | 1.57 | .86 |
| US Army Japan | | | .37 | |
| Units in Hawaii | .16 | .21 | .90 | 1.74 |
| Units in Thailand | | | | |
| Units in Alaska | .30 | .10 | .90 | .70 |
| Units in Panama/Canal Zone | .14 | | 1.11 | 1.53 |

# CLE News

**1. CONTRACT ATTORNEYS' WORKSHOP: WE NEED YOUR HELP.** The 3d Contract Attorneys' Workshop will be held at TJAGSA on 4-5 December 1979. This course is for you, the contracting attorney working at the nitty-gritty level of government acquisition. It's your chance to share with other contract lawyers those knotty problems that you've faced locally and that are likely to be encountered again elsewhere. You and your staff judge advocate or command counsel are encouraged to begin thinking about problems you might want to present at the workshop. A problem submission format will accompany letters to the field in the near future. The workshop structure is designed to address problems faced at all stages of the acquisition process from formation to contract close-out. To make this workshop a success we need you *and* your ideas.

**2. TJAGSA CLE Courses**

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

October 9-12: Judge Advocate General's Conference and CLE Seminars.

October 15-18: 3d Litigation (5F-F29).

October 22-December 21: 91st Judge Advocate Officer Basic (5-27-C20).

October 22-26: 7th Defense Trial Advocacy (5F-F34).

October 29-November 9: 82d Contract Attorneys' (5F-F10).

November 13-16: 10th Fiscal Law (5F-F12).

November 14-16: 4th Government Information Practices (5F-F28).

November 26-30: 50th Senior Officer Legal Orientation (5F-F1).

December 4-5: 3d Contract Attorneys' Workshop (5F-F15).

December 10-13: 7th Military Administrative Law Developments (5F-F25).

January 7-11: 10th Contract Attorneys' Advanced (5F-F11).

January 7-11: 13th Law of War Workshop (5F-F42)

January 14-18: 1st Negotiations, Changes & Terminations (5F-F14).

January 21-24: 9th Environmental Law (5F-F27).

January 28-February 1: 8th Defense Trial Advocacy (5F-F34).

February 4-April 4: 92d Judge Advocate Officer Basic (5-27-C20).

February 4-8: 51st Senior Officer Legal Orientation (5F-F1).

February 11-15: 6th Criminal Trial Advocacy (5F-F32).

February 25-29: 19th Federal Labor Relations (5F-F22).

March 3-14: 83d Contract Attorneys' (5F-F10).

March 10-14: 14th Law of War Workshop (5F-F42).

March 17-20: 7th Legal Assistance (5F-F23).

March 31-April 4: 52d Senior Officer Legal Orientation (5F-F1).

April 8-9: 2d U.S. Magistrate's Workshop (5F-F33).

April 9-11: 1st Contract, Claims, Litigation & Remedies (5F-F13).

April 21-25: 10th Staff Judge Advocate Orientation (5F-F52).

April 21-May 2: 84th Contract Attorneys' Course (5F-F10).

April 28-May 1: 53d Senior Officer Legal Orientation (War College) (5F-F1).

May 5-16: 2d International Law II (5F-F41).

May 7-16: 2d Military Lawyer's Assistant (512-71D/50).

May 19-June 6: 20th Military Judge (5F-F33).

May 20-23: 11th Fiscal Law (5F-F12).

May 28-30: 1st SJA Responsibilities Under New Geneva Protocols (5F-F44).

June 9-13: 54th Senior Officer Legal Orientation (5F-F1).

June 16-27: JAGSO.

June 16-27: 2d Civil Law (5F-F21).

July 7--18: USAR SCH BOAC/JARC C&GSC.

July 14-August 1: 21st Military Judge (5F-F33).

July 21-August 1: 85th Contract Attorneys' (5F-F10).

August 4-October 3: 93d Judge Advocate Officer Basic (5-27-C20).

August 4-8: 10th Law Officer Management (7A-713A).

August 4-8: 55th Senior Officer Legal Orientation (5F-F1).

August 18-22May: 29th Judge Advocate Officer Graduate (5-27-C22).

September 10-12: 2d Legal Aspects of Terrorism (5F-F43).

September 22-26: 56th Senior Officer Legal Orientation (5F-F1).

### 3. Civilian Sponsored CLE Courses

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St. NW, Washington, DC 20007. Phone: (202) 965-3500.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

NCAJ: National Center for Administration of Justice, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NJC: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-444 (In MN call (612) 338-1977).

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

## SEPTEMBER

6-7: PLI, Tax Aspects of Litigation, Hyatt Regency Hotel, San Francisco, CA. Cost: $175.

8: ALI-ABA, Constitutional Law and the Protection of Private Interests, Villanova University School of Law, Villanova, PA.

12-14: PLI, Real Estate Valuation and Condemnation, Los Angeles Hilton, Los Angeles, CA. Cost: $225.

12-14: PLI, Fundamentals of Real Estate Transactions, The Sheraton Centre Hotel, New York, NY. Cost: $250.

13-14: ALI-ABA, Estate Planning, New England Law Institute, Inc. Boston, MA.

13-14: PLI, Estate Planning Institute, Palmer House Hotel, Chicago, IL. Cost: $200.

13-14: PLI, Post Mortem Estate Planning, Los Angeles Bonaventure Hotel, Los Angeles, CA. Cost: $190.

14-15: ALI-ABA, Trial Evidence in Federal and State Courts: A Clinical Study of Recent Developments, Charleston, SC.

14-15: ALI-ABA: Consumer Cases under the Bankruptcy Code, New Orleans, LA.

17-21: Fourteenth Annual Southern Federal Tax Institute, Hyatt Regency Hotel, Atlanta, GA. Cost: $250. Southern Federal Tax Institute, Inc., 407 Cain Tower, 229 Peachtree St., N.E., Atlanta, GA.

23-27: ABA, Appellate Judges' Seminar, Boston, MA.

23-28: NJC, Sentencing Felons—Graduate, University of Nevada, Reno, NV.

23-12 October: NJC, General Jurisdiction—General, University of Nevada, Reno, NV.

27-29: ALI-ABA, Atomic Energy Licensing and Regulation, Washington, DC.

27-28: PLI, Managing the Large Law Firm, Houston Oaks Hotel, Houston, TX. Cost: $225.

## OCTOBER

4-6: ALI-ABA, The New Federal Bankruptcy Code, Chicago, IL.

7-12: NJC, Criminal Evidence—Graduate, University of Nevada, Reno, NV.

11-12: PLI, Estate Planning Institute, The Roosevelt Hotel, New York, NY. Cost: $200.

24-26: PLI, Fundamental Real Estate Transactions, Hyatt Regency Hotel, New Orleans, LA. Cost: $250.

24-26: PLI, Real Estate Valuation and Condemnation, The Statler Hilton Hotel, New York, NY. Cost: $225.

# JAGC Personnel Section

*PP&TO, OTJAG*

## 1. New TJAG and TAJAG Appointed

On 2 July 1979 Major General Alton H. Harvey became The Judge Advocate General of the United States Army. Major General Hugh J. Clausen became The Assistant Judge Advocate General on the same date.

MG Harvey was born 11 April 1932 at McComb, Mississippi. He entered the Army as an enlisted man in January 1951 and, after service with airborne and ranger units, completed OCS in July 1952 and was commissioned in the infantry. Thereafter, MG Harvey served with the 3d Infantry Division in Korea until his release from active duty in September 1953. Upon return to civilian life, he attended the University of Mississippi from which he received a B.A. degree in 1956 and an LL.B. in 1958. He returned to active duty as an Army lawyer in the Judge Advocate General's Corps in 1958.

General Harvey is a graduate of the Armor School, The Judge Advocate General's School, the Defense Language Institute, the United States Army Command and General Staff College, and the Industrial College of the Armed Forces. General Harvey is a senior parachutist and special forces and ranger qualified. His awards include the Legion of Merit with two oak leaf clusters, the Bronze Star for Valor with cluster, the Meritorious Service Medal, the Air Medal, the Purple Heart, and the Combat Infantry Badge.

General Harvey's past assignments include Assistant Judge Advocate General for Civil Law; Chief of the Defense Appellate Division, Office of The Judge Advocate General (July 1975–December 1976); Chief of the Criminal Law Division, Office of The Judge Advocate General (April 1972–August 1974); Staff Judge Advocate, 101st Airborne Division, and later United States Army Support Command, Vietnam (August 1971–April 1972); Staff Judge Advocate, United States Military Assistance Command/Joint United States Military Advisory Group, Thailand (July 1968–August 1971); Staff Judge Advocate, 6th Infantry Division, Fort Campbell, Kentucky (January 1968–July 1968); and Staff Judge Advocate, United States Army John F. Kennedy Center for Special Warfare and later XVIII Airborne Corps, Fort Bragg, North Carolina (October 1966–January 1968).

MG Clausen was born in Mobile, Alabama, on 25 December 1926. He served an enlisted tour in the Navy, then returned to college upon his discharge in June 1946. He attended Spring Hill College, the University of Louisville and the University of Alabama School of Law. He received his law degree in 1950 and was commissioned in US Army Reserve as a judge advocate officer. General Clausen was then called to active duty in March 1951.

General Clausen has completed the Advanced Management Program in the Graduate School of Business Administration of Harvard University in 1970; the Nonresident Course of the US Army War College; Command and General Staff College; the US Army Language School; and the Advanced Class at The Judge Advocate General's School.

MG Clausen's prior assignments include Chief of the US Army Legal Services Agency since 30 March 1976; Staff Judge Advocate, III Corps and Fort Hood (June 1973–March 1976); Executive Officer to The Judge Advocate General (May 1972–June 1973); Chief of the Military Justice Division, Office of The Judge Advocate General (June 1971–May 1972); Chief of Legislation Division in the Office of Congressional and Legislative Liason; Staff Judge Advocate of the 1st Infantry Division (June 1968–June 1969); and the Judge Advocate, Disciplinary Barracks, Fort Leavenworth, Kansas.

General Clausen's awards include the Legion of Merit with one Oak Leaf Cluster, Bronze Star Medal with three Oak Leaf Clusters, Meritorious Service Medal, and the Air Medal with one Oak Leaf Cluster.

**2. RA Promotions**

*Major General*

| | |
|---|---|
| HARVEY, Alton H. | 18 Jun 77 |
| CLAUSEN, Hugh J. | 19 Jun 77 |

*Colonel*

| | |
|---|---|
| ANDREWS, Thomas T. | 3 Jul 79 |
| GARNER, James G. | 15 Jul 79 |

*Lieutenant Colonel*

| | |
|---|---|
| FUGH, John L. | 25 Jun 79 |
| KUCERA, James | 30 Jun 79 |
| LASSETER, Earle F. | 12 Jul 79 |

*Major*

| | |
|---|---|
| ANDERSON, Gary L. | 9 Jun 79 |
| CARPENTER, Bernard | 9 Jun 79 |
| COUPE, Dennis F. | 17 Jul 79 |
| DENISON, Gordon R. | 7 Jun 79 |
| GAMBOA, Anthony H. | 9 Jun 79 |
| HEASTON, William P. | 9 Jun 79 |
| HIGLEY, John W., Jr. | 9 Jun 79 |
| KELLY, Jerome E. | 9 Jun 79 |
| LEHMAN, William J. | 9 Jun 79 |
| MOUSHEGIAN, Vahan J. | 27 Jul 79 |
| SMITH, Peter M. | 31 Jul 79 |

*Captain*

| | |
|---|---|
| CARROLL, Raoul L. | 7 Jun 79 |
| CAVALIER, John A. | 7 Jun 79 |
| CUMMINGS, Edward R. | 7 Jun 79 |
| HOLLAND, Gary J. | 7 Jun 79 |
| HOLLAND, Robert F. | 7 Jun 79 |
| KING, John E. | 7 Jun 79 |
| SMITH, John M. | 7 Jun 79 |
| WHEELER, Courtney B. | 28 Jul 79 |

*1LT*

| | |
|---|---|
| HARVEY, Mark W. | 2 Jun 79 |

**3. AUS Promotions**

*Major General*

| | |
|---|---|
| HARVEY, Alton H. | 1 Sep 75 |
| CLAUSEN, Hugh J. | 1 Sep 75 |

*Colonel*

| | |
|---|---|
| ANDREWS, Thomas T. | 13 Jun 79 |

*Major*

| | |
|---|---|
| ANDERSON, Larry D. | 12 Jun 79 |
| BRAWLEY, Michael J. | 13 Jun 79 |
| DECKERT, Raymond R. | 3 Jun 79 |
| DOYLE, Brooks S. | 10 May 79 |
| FRYER, Eugene D. | 14 Jun 79 |
| HAMELIN, Normand J. | 12 Jun 79 |
| LANE, Thomas C. | 14 Jun 79 |
| MANNING, Jay P. | 12 Jun 79 |
| MCLAURIN, John P. | 12 Jun 79 |
| OTTMER, Peter P. | 12 Jun 79 |
| POLLEY, James D. | 7 May 79 |
| RIGNEY, Marvin G. | 14 Jun 79 |
| THIELE, Alan R. | 12 May 79 |
| TOMES, Jonathan P. | 8 May 79 |

*CW4*

| | |
|---|---|
| RAMSEY, Alzie E. | 6 Jun 79 |

*CW3*

| | |
|---|---|
| HAYNES, Calvin R. | 3 Jun 79 |

**4. Enlisted Promotions**

The following servicemembers were recommended for promotion to grade E7 by the FY 79 DA Selection Board which adjourned on 14 February 1979:

**MOS 71D**

| | |
|---|---|
| ALEXANDER, Larry | 5572 |
| ANDERSON, Roger D. | 0695 |
| BARATI, Stephen G. | 11222 |
| BEEMAN, John E. | 7492* |
| BURTON, John A. | 1096 |
| BUSHERCRUZ, Nector | 0588 |
| CAMPBELL, Gary A. | 1029 |
| CARCELLI, Robert. | 2171 |
| CLARK, John M. | 0545 |
| CLAYTON, Richard L. | 0620 |
| COLEMAN, Clay C. | 0130 |
| CORPUZ, Lawrence J. | 0891 |
| COULTER, James J. | 0779 |
| DOUGHERTY, Jonathan | 2057 |
| DOWDELL, Frederick | 0556 |
| DUMAS, George | 2303 |
| FARMER, Charles D. | 7554* |
| FLECK, Gary R. | 2412 |
| GREENE, Stephen W. | 0535 |
| HOSKINS, Donald R. | 1065 |
| HUFF, John E. | 7978* |
| HUGHES, Don D. | 7578* |
| JOHNSON, Richard A. | 3974 |
| JOSE, Dalton D. | 4147 |
| KEARNY, Larry L. | 1117 |

| | | | |
|---|---|---|---|
| KELTY, Roger A. | 0260 | SHOWERS, Terry L. | 0606 |
| KORTZ, Keith D. | 6166 | SIMPSON, Baxter S. | 5979 |
| KNUDSEN, Patrick J. | 5253 | SMITH, Harold L. | 4022 |
| LANE, Freddie R. | 0617 | SPRADER, Lawrence | 0700 |
| LEALIIEE, Uilifelet | 0961 | STRUNTZ, Duane A. | 2405 |
| LINDSEY, Larry R. | 6543 | TAYLOR, Michael G. | 6988 |
| LINTON, George W. | 3373 | THOMPSON, Bernard E. | 4045 |
| MACKAY, Edward | 7544* | TOLLEFSON, Richard | 5172 |
| MASSEY, Robert N. | 5124 | TOWNS, Beate K. | 8041 |
| MATHEWS, Arthur T. | 7856* | TUBBS, James F. | 5405 |
| MAY, John R. | 6582 | VEST, Richard L. | 2642 |
| MCQUIGG, William D. | 1456 | WELCH, Larry T. | 0797 |
| MILLER, Allen P. | 5725 | WELDER, Russell B. | 1036 |
| MIZE, Tommy R. | 1454 | WELSH, Michael J. | 7127* |
| MORGAN, Jeffrey P. | 3934 | WHITTINGTON, Eddie | 5455 |
| MURPHY, David P. | 2127 | WIBBELS, Ronny E. | 5493 |
| MYERS, Claude L. | 1102 | YEATES, John V. | 0766 |
| NICOLAI, John A. | 2414 | YINGLING, Lawrence | 6023 |
| NOFTSGER, Morris H. | 7994* | | |
| OWENS, Harlan R. | 3002 | **MOS 71E** | |
| PAGEL, Walter W. | 2625 | AKACKI, Edward V. | 3875 |
| PEARSON, Jerrold R. | 5052 | BISHOP, Max A. | 0995 |
| PERKINS, Stephen P. | 7444* | BROWN, Richard B. | 4670 |
| PHELPS, Douglas M. | 0873 | FOX, Deborah J. | 7360* |
| RICHARDSON, James D. | 2865 | HASHIMURA, Jerry K. | 7876* |
| RIGGS, Fred H. | 2859 | SHEEHAN, William M. | 1067 |
| ROSE, Curtis A. | 3570 | TEMPLETON, Delbert | 1682 |
| ROWLAND, Steven S. | 5574 | WIDDIS, Steven W. | 1619 |
| SAMUELSON, Ronald K. | 2659 | WILLIAMS, Ligia I. | 3933 |
| SCONZO, James E. | 0740 | *Designates Secondary Zone Selection | |

**5. Reassignments**

| *Colonel* | *FROM* | *TO* |
|---|---|---|
| RADOSH, Burnett | FT Dix, NJ | DARCOM, Alexandria, VA |
| *Lieutenant Colonel* | | |
| MOONEYHAM, John | USALSA w/dty Ft Amador, Canal Zone | ACMR |
| RAY, Paul H. | FT Bragg, NC | USALSA |
| *Major* | | |
| CLARK, Elliot J. | FT Bragg, NC | USALSA |
| NIX, John H. | FT Gordon, GA | FT Dix, NJ |
| *Captain* | | |
| BOOTH, Thomas | FT Dix, NJ | USALSA, w/dty FT Dix, NJ |
| BRADSHAW, Paul | FT McLellan, AL | USALSA, w/dty FT McLellan, AL |
| BREWER, Garry L. | Korea | FT Campbell, KY |

| *Captain* | *FROM* | *TO* |
|---|---|---|
| CHANDLER, Garth | Germany | S&F, USMA |
| CURTIS, R. Wade | USALSA | 28th Grad Course, TJAGSA |
| DOYLE, Brooks S. | WASH DC | USALSA |
| EVELAND, Dean S. | FT Harrison, IN | USALSA, w/dty FT Harrison, IN |
| HALL, Walter A. | FT Benning, GA | USALSA, w/dty FT Benning, GA |
| MURPHY, Thomas | Germany | USALSA |
| NAGLE, James F. | FT Monmouth, NJ | USALSA |
| NOLAN, John. | FT Ord, CA | S&F, TJAGSA |
| NEDS, Michael R. | FT Stewart GA | OTJAG |
| O'NEILL, Patrick | Korea | USATACOM, Warren, MI |
| REYNOLDS, John | FT Dix, NJ | S&F, USMA |
| SMITH, Gary W. | Korea | Germany |
| UDLAND, Robert | Germany | USALSA |
| STEINBECK, Mark | Hunter Airfield, GA | FT Stewart, GA |
| TAYLOR, George | ASBCA | OTJAG |
| TYRELL, David | FT Ord, CA | FT McArthur, CA |
| WELTON, Mark D. | FT Polk, LA | S&F, USMA |
| WHITE, Rozann S. | Korea | MTMC, Bailey Crossroads, VA |

## Current Materials of Interest

Asher, Steven E., *Reforming the Summary Court-Martial*, 79 Columbia Law Review 173 (January, 1979).

*Divergent Trends in Military Law*, 31 Rutgers Law Review 759-85 (December, 1978).

*Family Law—United States has not consented to be sued in garnishment proceedings to enforce Texas court's division of military retirement benefits*, 10 Texas Tech Law Review 214-227 (Winter, 1978).

General Accounting Office, *AWOL in the Military: A Serious and Costly Problem*, U.S.G.A.O., Distribution Section, Room 1518, 441 G Street NW, WASH DC 20548.

*Use of Detailed Counsel as Summary Court-Martial Officers*, Inclosure 14 to Off the Record (OTJAG, U.S. Navy), Issue No. 78, 4 June 1979

## Erratum

"A Matter of Record," Notes from Government Appellate Division, USALSA, printed in the June 1979 issue of *The Army Lawyer* at page 33 contains an error. Paragraph one should read as follows:

1. Arraignment:

Trial counsel *did not* update his "flyer" or "arraignment sheet" before giving it to the court members after the military judge dismissed several charges or amended specifications.

**DA Pam 27-50-80**

By Order of the Secretary of the Army:

E. C. MEYER
*General, United States Army*
*Chief of Staff*

Official:

J. C. PENNINGTON
*Major General, United States Army*
*The Adjutant General*

★ U.S. GOVERNMENT PRINTING OFFICE: 1979